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Sup. Ct.

Vol. I

TRANSCRIPT OF RECORD

(Pages 1 to 392)

Supreme Court of the United States

OCTOBER TERM, 1945 46

No. 64

AMERICAN POWER & LIGHT COMPANY,
PETITIONER,

vs.

SECURITIES AND EXCHANGE COMMISSION

No. 75

ELECTRIC POWER & LIGHT CORPORATION,
PETITIONER,

vs.

SECURITIES AND EXCHANGE COMMISSION

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONS FOR CERTIORARI FILED JUNE 16, 1944.

CERTIORARI GRANTED MAY 28, 1945.

Nos. 166 -167

VOLUME I.

Office - Supreme Court, U. S.
FILED
JUN 16 1944
CHARLES ELMORE CROPLEY
CLERK

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1942.

No. 3823.

AMERICAN POWER & LIGHT COMPANY,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

No. 3824.

ELECTRIC POWER & LIGHT CORPORATION *v.* SAME.

PETITIONS FOR REVIEW OF ORDERS OF THE SECURITIES AND EXCHANGE COMMISSION.

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Pages 1 to 392, inclusive.

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FRANK A. REID,
ARTHUR A. BALLENTINE,
for AMERICAN POWER & LIGHT CO., *Petitioner.*

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R. GRAHAM HEINER,
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for ELECTRIC POWER & LIGHT CORPORATION, *Petitioner.*

JOHN F. DAVIS,
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BOSTON:
PRINTED UNDER DIRECTION OF THE CLERK
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UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1942.

No. 3823.

AMERICAN POWER & LIGHT COMPANY,
PETITIONER,
v.
SECURITIES AND EXCHANGE COMMISSION,
RESPONDENT.

PETITION OF AMERICAN POWER & LIGHT COMPANY FOR REVIEW OF ORDERS OF THE SECURITIES AND EXCHANGE COMMISSION.

[FILED IN CIRCUIT COURT OF APPEALS OCTOBER 20, 1942.]

To the United States Circuit Court of Appeals for the First Circuit and the Honorable Judges thereof:

The petition of American Power & Light Company respectfully shows to this Court as follows:

(1) Your petitioner is a corporation organized and existing under the laws of the State of Maine. Its principal corporate office is in the State of Maine and it has at no time qualified to do business as a foreign corporation in any other State.

(2) Your petitioner being aggrieved by certain orders of the Securities and Exchange Commission (hereinafter called the "Commission"), dated August 22, 1942 and August 28, 1942, respectively, files this petition under Section 24(a) of the Public Utility Holding Company Act of 1935 (hereinafter called the "Act") to review said orders

and set them aside in whole. A copy of the order dated August 22, 1942 is annexed to this petition as Appendix A, and a copy of the order dated August 28, 1942 is annexed to this petition as Appendix B.

(3) The nature of the proceedings before the Commission, which resulted in the orders of which review is hereby sought, was as follows:

(a) On or about May 9, 1940, the Commission instituted a proceeding against Electric Bond and Share Company, your petitioner and other companies entitled "In the Matter of Electric Bond and Share Company, et al., File No. 59-12" by "Notice of and Order for hearing pursuant to Section 11(b)(2) of the Public Utility Holding Company Act of 1935" in which it was charged that "The structure of the holding company system of said Electric Bond and Share Company is unduly and unnecessarily complicated", and "Voting power is unfairly and inequitably distributed among security holders of the holding company system of said Electric Bond and Share Company".

Said Section 11(b)(2) of the Act, in so far as it is here material, provides as follows:

"SEC. 11 * * * (b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

* * * * *

(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of

such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. * * *"

(b) After certain motions and proceedings, the Commission, on June 7, 1940, issued an order limiting the proceeding initially "to the issue of whether it is necessary to discontinue the existence of American Power & Light Company, Electric Power & Light Corporation, National Power & Light Company and American & Foreign Power Company, Inc., or any of them, in order to insure that the structure of the holding company system of the Electric Bond and Share Company shall not be unduly or unnecessarily complicated and that voting power shall not be unfairly or inequitably distributed among security holders of such system * * *."

(c) An answer on behalf of your petitioner to the allegations contained in the said notice and order for hearing was filed with the Commission on June 15, 1940 admitting or denying said allegations, and setting forth various defenses, including the defense that the Section of the Act under which the proceeding was instituted was unconstitutional.

(d) Thereafter, on June 18, 1940 hearings were commenced before an Examiner of the Commission under said notice and order as limited by said order of June 7, 1940 and were continued from time to time.

(e) After counsel for the Public Utilities Division

of the Commission had submitted certain evidence to the Examiner in said proceeding, said counsel claimed that they had made out a *prima facie* case and rested their case. Thereafter, on September 9, 1940 an amended answer, which was substantially the same as the original answer, was filed, and on the same date a motion to dismiss the proceeding was filed on behalf of your petitioner on various grounds set forth in said motion, including questions of constitutionality.

(f) On July 23, 1941 your petitioner, reserving its constitutional rights, filed with the Commission its application under Section 11(e) of the Act for approval of the plan of reorganization annexed to said application.

(g) On December 6, 1941 your petitioner filed with the Commission its motion to consolidate the proceeding instituted by the Commission against your petitioner and others under Section 11(b)(2) of the Act, with your petitioner's application for approval of the above mentioned plan filed by it with the Commission.

(h) Hearings before the Examiner under the Commission's notice and order for hearing, in so far as they related to your petitioner, continued from time to time, with adjournments, until July 22, 1942 when the hearings were closed, and your petitioner then renewed its motion to dismiss the proceeding.

(i) On August 22, 1942 the Commission made and filed its order in the proceeding, based on its findings and opinion, denying your petitioner's motion to dismiss the proceeding, denying your petitioner's motion for consolidation, and ordering that the existence of your petitioner shall be terminated and that it shall be dissolved. This is one of the orders of which review is sought by this petition and is attached hereto as Appendix A.

(j) On August 27, 1942 your petitioner filed an application with the Commission, within the time prescribed by the rules of the Commission, for rehearing and to vacate and set aside the Commission's order dated August 22, 1942. By order made and filed on August 28, 1942, the Commission denied said petition. This is the other order of which this petition seeks review and is attached hereto as Appendix B.

(4) The jurisdiction of this Court is invoked under Section 24(a) of the Act which, in part, provides as follows:

"SEC. 24. (a) Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. * * *"

Your petitioner resides in the State of Maine, which is within the First Judicial Circuit.

(5) The objections of your petitioner to the orders of the Commission of which review is hereby sought are as follows:

(a) Section 11(b)(2) of the Act, and the proceeding instituted and conducted by the Commission thereunder, are unconstitutional and void in that,

(i) Said Section 11(b)(2) is not a regulation of commerce, nor on the subject of bankruptcies, nor for the establishment of post offices and post roads, within the meaning of the applicable clauses of Article I, Section 8, of the Constitution of the United

States, and is not within any other power vested in the Congress by said Constitution, but is an invasion of the powers reserved to the states or the people within the meaning of Article X of the Amendments to the Constitution of the United States in that it seeks to interfere with and control corporations established under State laws, the exercise by them of their charter powers, and the distribution of voting power among security holders in corporations created under and governed by the laws of the various states;

(ii) The enforcement of said Section 11(b)(2) or of any order made by the Commission thereunder, which would require elimination of, or a change in corporate structure of, any company in the system, or redistribution of voting power among security holders, will deprive your petitioner of property without due process of law in violation of Article V of the Amendments to the Constitution of the United States;

(iii) Said Section 11(b)(2) delegates to the Commission legislative power of the Congress in violation of Article I, Sections 1 and 8, of the Constitution of the United States in that it affords no guide or standard or definition for the determination of what form of corporate structure may be approved by the Commission on the one hand, or held by it on the other hand to unduly or unnecessarily complicate the structure of a holding company system, or what is a fair or equitable distribution of voting power among security holders, but entrusts such determination to the unlimited discretion of the Commission. The words used are not referable to any grant of federal power and are merely an unlimited grant of power to the Commission to make such al-

terations or changes in corporate structure or distribution of voting power among security holders as the Commission may deem appropriate;

(iv) Said Section 11(b)(2) purports to authorize abrogation and restatement of contract rights among security holders of companies not made parties respondent, and of security holders of your petitioner in proceedings to which such security holders are not parties, or capable of being made parties, and its application and enforcement would deprive such non-respondent companies and security holders of property without due process of law, in violation of Article V of the Amendments to the Constitution of the United States;

(v) Said Section 11(b)(2), as applied by the orders sought to be reviewed, is an *ex post facto* law in violation of Article I, Section 9, of the Constitution of the United States.

(b) If, notwithstanding the foregoing, the said Section 11(b)(2) may be constitutionally applied, it may be so applied only (i) in the administration of a constitutional grant of power to the Commission to regulate corporations engaged in interstate commerce, and then only in so far as its application may constitute a regulation of interstate commerce within the powers granted to the Congress under the provisions of Article I, Section 8, of the Constitution of the United States, and neither your petitioner, nor any of its subsidiaries, is either in its corporate existence or structure or in the distribution of voting rights of its security holders within the orbit of such power; (ii) in the administration and exercise of the bankruptcy powers conferred upon the Congress by Article I, Section 8, of the Constitution of the United States, and neither your petitioner nor any of its subsidiaries is either insolvent or

bankrupt or subject to such bankruptcy powers; or (iii) as auxiliary to a valid order made by the Commission under Section 11(b)(1) of the Act (if said Section be constitutional, which your petitioner denies) after or in connection with the making of a valid order under said Section 11(b)(1) which to be effectually carried out requires a revamping of corporate structure or the elimination of some company or redistribution of voting power among security holders to effectuate the purposes of said Section 11(b)(1).

(c) For the reasons, among others, stated in paragraph (b)(iii), *supra,* the Commission was without power to proceed with hearings in the proceeding under Section 11(b)(2); except after the completion of, or as auxiliary to, or in conjunction with, its proceeding under Section 11(b)(1) which is pending before the Commission.

(d) The notice and order for hearing by which the Commission instituted the proceeding was defective for want of necessary parties, in that subsidiary companies of your petitioner named in said notice and order and whose position and voting rights of whose securities in the system would necessarily be considered and affected were not made parties; and further in that security holders of the companies affected whose rights would necessarily be involved were likewise not made parties. The orders of the Commission sought to be reviewed necessarily affect contract and property rights of individual and corporate holders of such securities, and could not be made in a proceeding to which said security holders are not parties.

(e) The orders sought to be reviewed which direct that your petitioner's existence shall be terminated and that it shall be dissolved for the reason that your petitioner's "corporate structure and continued existence * * * unduly or unnecessarily complicate the

structure, or unfairly or inequitably distribute voting power among security holders, of the holding-company system of Electric Bond and Share Company" were beyond the power of the Commission under the Act and such application by the Commission of Section 11(b)(2) of the Act deprives your petitioner, its security holders, its subsidiaries and their security holders, of property without due process of law, in violation of Article V of the Amendments to the Constitution of the United States.

(f) Your petitioner should not be dissolved in order to insure that the structure of the holding company system of Electric Bond and Share Company shall not be unduly or unnecessarily complicated or that voting power shall not be unfairly or inequitably distributed among security holders of that system, since such dissolution would deprive your petitioner, its security holders, its subsidiaries, and their security holders, of property without due process of law in violation of Article V of the Amendments to the Constitution of the United States.

(g) The dissolution of your petitioner is not an appropriate remedy to carry out the requirements of the Act or to give effect to the intent of Congress as expressed in the Act.

(h) The orders hereby sought to be reviewed are not in conformity with Section 11(b)(2) which provides that it shall be the duty of the Commission "as soon as practicable after January 1, 1938" to require steps to be taken as set forth in that Section. Said orders should not have been made since it is not "practicable" at this time to require the acts provided for therein in view of the effect of the present emergency created by the war including the depressed condition of financial markets and the present uncertainties and difficulties of our national economy. Furthermore, said

orders were premature in that the studies and investigations prescribed in Section 30 of the Act had not been made by the Commission.

(i) The Commission erred in overruling and denying your petitioner's motion to dismiss the Commission's notice and order for hearing and the proceedings thereunder, made at the conclusion of the Commission's case and renewed at the conclusion of the hearings.

(j) The Commission erred in sustaining the rulings of the Trial Examiner excluding testimony offered by your petitioner and in rejecting offers of proof in support thereof with respect to the valuation of assets of your petitioner and the earning power thereof, both as bearing on the issues in said proceeding under Section 11(b)(2) of the Act and as bearing on the plan of reorganization filed by your petitioner under Section 11(e) of the Act.

(k) The Commission erred in denying the motion of your petitioner to consolidate the application of your petitioner for approval of said plan of reorganization filed under Section 11(e) of the Act with the said proceeding under Section 11(b)(2) of the Act.

(l) The Commission erred in its findings and conclusions (on which its orders are based) that the corporate structure and continued existence of your petitioner unduly and unnecessarily complicate the structure of the Electric Bond and Share Company holding company system, and unfairly and inequitably distribute voting power among the security holders of said system.

(m) The Commission erred in its findings and conclusions (on which its orders are based) that to effect the requirements of Section 11(b)(2) of the Act it is necessary that your petitioner's existence be terminated and that said company be dissolved.

(n) The Commission erred in its findings and conclusions (on which its orders are based) to the effect that the plan of reorganization filed by your petitioner under Section 11(e) of the Act is defective and not entitled to consideration prior to the entry of said orders.

Wherefore your petitioner, American Power & Light Company, respectfully prays (a) that this Honorable Court take jurisdiction over the parties and subject matter of this petition; (b) that a copy hereof be served upon the respondent Commission, as prescribed by law; (c) that this Honorable Court review the said orders of the respondent Commission, dated August 22, 1942 and August 28, 1942, respectively, and upon such review set aside said orders in whole; and (d) that this Honorable Court grant your petitioner such other and further relief as may be deemed just and proper in the premises.

And your petitioner will ever pray.

Respectfully submitted,

AMERICAN POWER & LIGHT COMPANY

By H. L. ALLER, *President.*

Attest: D. W. JACK, *Secretary.*

(CORPORATE SEAL)

Dated October 19, 1942.

SIMPSON THACHER & BARTLETT,
120 Broadway, New York, N. Y.

REID & PRIEST,
2 Rector Street, New York, N. Y.

ROOT, CLARK, BUCKNER & BALLANTINE,
31 Nassau Street, New York, N. Y.

Attorneys for Petitioner

JOHN F. MACLANE,
FRANK A. REID,
ARTHUR A. BALLANTINE,
of Counsel.

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.

H. L. ALLER, being duly sworn, deposes and says that he is President of AMERICAN POWER & LIGHT COMPANY and that he has read the above petition by him subscribed and knows the contents thereof, and that the same is true of his own knowledge.

H. L. ALLER.

Sworn to before me this 19th day of October, 1942.

FLORENCE O. DEMO,
Notary Public, Bronx County.

Bronx Co. Clk's No. 26, Reg. No. 37-D-44
N. Y. Co. Clk's No. 140, Reg. No. 4-D-72
Commission Expires March 30, 1944

APPENDIX A.

ORDER REQUIRING DISSOLUTION OF AMERICAN POWER & LIGHT COMPANY.

August 22, 1942.

[MEMORANDUM: This order of dissolution is here omitted as it is printed as part of the Transcript of Record, page 650 *infra*. A. I. CHARRON, *Clerk*.]

APPENDIX B.

ORDER DENYING PETITION TO VACATE AND SET ASIDE ORDER OF AUGUST 22, 1942, AND FOR REHEARING.

August 28, 1942.

[MEMORANDUM: This order is here omitted as it is printed as part of the Transcript of Record, page 677 *infra*. A. I. CHARRON, *Clerk*.]

No. 3824.

ELECTRIC POWER & LIGHT CORPORATION,
PETITIONER,
v.
SECURITIES AND EXCHANGE COMMISSION,
RESPONDENT.

PETITION OF ELECTRIC POWER & LIGHT CORPORATION FOR REVIEW OF ORDERS OF THE SECURITIES AND EXCHANGE COMMISSION.

[FILED IN CIRCUIT COURT OF APPEALS OCTOBER 20, 1942.]

To the United States Circuit Court of Appeals for the First Circuit and the Honorable Judges thereof:

The petition of Electric Power & Light Corporation respectfully shows to this Court as follows:

(1) Your petitioner is a corporation organized and existing under the laws of the State of Maine. Its residence and principal corporate office is in the State of Maine and it has at no time qualified to do business as a foreign corporation in any other State.

(2) Your petitioner being aggrieved by certain orders of the Securities and Exchange Commission (hereinafter called the "Commission"), dated August 22, 1942 and August 28, 1942, respectively, files this petition under Section 24(a) of the Public Utility Holding Company Act of 1935 (hereinafter called the "Act") to review such orders and set them aside in whole. A copy of the order dated August 22, 1942 is annexed to this petition as Appendix A, and a copy of the order dated August 28, 1942 is annexed to this petition as Appendix B.

(3) Your petitioner is a "registered holding company," as that term is defined in Section 2(a)(12) of the Act, and is one of the companies in the so-called Electric Bond and

Share Company System, a "holding-company system" within the definition of Section 2(a)(9) of the Act. Your petitioner owns, directly or indirectly, stock or other interests in 25 subsidiaries, not including 13 name saving corporations. The book value of your petitioner's "Investment Securities and Advances—Subsidiaries, Etc.," as shown by its balance sheet as of December 31, 1941, is $184,409,321.09. Your petitioner at September 30, 1942, had issued and outstanding 515,135 shares of $7 Preferred Stock, 225,430⅔ shares of $6 Preferred Stock, 74,814 shares of Second Preferred Stock, Series "A" ($7), and 3,454,689 shares of Common Stock. Such shares of capital stock are of no par value and have a combined stated value on your petitioner's balance sheet of $155,044,139.40. In addition your petitioner had outstanding at the same date $30,032,000.00 principal amount of long term debt. The ownership of such securities by the public and by Electric Bond and Share Company (exclusive of 973 shares $7 Preferred Stock and 902 shares of Common Stock which have been reacquired) is shown by the following table:

Title of Security	Held by Public Number of Shares or Principal Amount	%	Held by Electric Bond and Share Company Number of Shares	%
Gold Debentures, 5% Series, due 2030	$30,032,000	100	——	——
$7 Preferred Stock	513,677 shs.	99.91	485 shs	0.09
$6 Preferred Stock	255,430⅔ shs.	100	——	——
Second Preferred Stock, Series "A" ($7)	60,909 shs.	81.41	13,905 shs.	18.59
Common Stock	1,477,149 shs.	42.77	1,976,638 shs.	57.23

Since 1935 no director or officer of your petitioner has been a director, officer or employee of Electric Bond and Share Company or any of its affiliated or subsidiary companies other than your petitioner and its subsidiaries. Although Electric Bond and Share Company owns securities repre-

senting 46.83% of the total voting power of your petitioner, the balance of such securities, including all the long term debt and most of the senior stocks, are held by the general investing public, which would suffer substantial injury by the enforcement of the orders referred to above in paragraph (2).

(4) The nature of the proceedings before the Commission, which resulted in the orders of which review is hereby sought, was as follows:

(a) On or about May 9, 1940, the Commission instituted a proceeding against Electric Bond and Share Company, your petitioner and other companies entitled "In the Matter of Electric Bond and Share Company, *et al.*, File No. 59-12" by "Notice of and Order for hearing pursuant to Section 11(b)(2) of the Public Utility Holding Company Act of 1935" in which it was charged, among other things, that "The structure of the holding company system of said Electric Bond and Share Company is unduly and unnecessarily complicated", and "Voting power is unfairly and inequitably distributed among security holders of the holding company system of said Electric Bond and Share Company".

Section 11(b)(2) of the Act, in so far as it is here material, provides as follows:

"SEC. 11 * * * (b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

* * * * *

(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-

company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. * * *"

(b) After certain motions and proceedings, the Commission on June 7, 1940, issued an order limiting the proceeding initially "to the issue of whether it is necessary to discontinue the existence of American Power & Light Company, Electric Power & Light Corporation, National Power & Light Company and American & Foreign Power Company, Inc., or any of them, in order to insure that the structure of the holding company system of the Electric Bond and Share Company shall not be unduly or unnecessarily complicated and that voting power shall not be unfairly or inequitably distributed among security holders of such system * * *".

(c) An answer on behalf of your petitioner to the allegations contained in the said notice and order for hearing was filed with the Commission on June 15, 1940 admitting or denying said allegations, and setting forth various defenses, including the defense that the Section of the Act under which the proceeding was instituted was unconstitutional.

(d) Thereafter, on June 18, 1940 hearings were commenced before an Examiner of the Commission

under said notice and order as limited by said order of June 7, 1940, and continued from time to time until August 22, 1942.

(e) After counsel for the Public Utilities Division of the Commission had submitted certain evidence to the Examiner in said proceeding, said counsel claimed that they had made out a *prima facie* case and rested their case. Thereafter, on September 9, 1940, an amended answer, which was substantially the same as the original answer, was filed, and on the same date a motion to dismiss the proceeding was filed on behalf of your petitioner on various grounds set forth in said motion, including questions of constitutionality.

(f) On December 4, 1941 your petitioner, reserving its constitutional rights, filed with the Commission its application under Section 11(e) of the Act for approval of the plan of reorganization annexed to said application.

(g) On December 6, 1941 your petitioner filed with the Commission its motion to consolidate the proceeding instituted by the Commission against your petitioner and others under Section 11(b)(2) of the Act, with your petitioner's application for approval of the above mentioned plan filed by it with the Commission.

(h) Hearings before the Examiner under the Commission's notice and order for hearing, in so far as they related to your petitioner, continued from time to time, with adjournments, until August 22, 1942 when the hearings were closed, and your petitioner renewed its motion to dismiss the proceeding at or near the conclusion of said hearing.

(i) On August 22, 1942 the Commission made and entered its order in the proceeding, based on its findings and opinion, denying your petitioner's motion to dismiss the proceeding, denying your petitioner's mo-

tion for consolidation of the dissolution proceedings with the proceedings commenced by your petitioner for consideration of its plan, and ordering that the existence of your petitioner shall be terminated and that it shall be dissolved. This is the principal order of which review is sought by this petition and is attached hereto as Appendix A.

(j) On August 27, 1942 your petitioner filed an application with the Commission, within the time prescribed by the rules of the Commission, for rehearing and to vacate and set aside the Commission's order dated August 22, 1942. By order made and entered August 28, 1942, the Commission denied said petition. This is the other order of which this petition seeks review and is attached hereto as Appendix B.

(5) The jurisdiction of this Court is invoked under Section 24(a) of the Act which, in part, provides as follows:

"Sec. 24. (a) Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. * * *"

Your petitioner resides in the State of Maine, which is within the First Judicial Circuit.

(6) The objections of your petitioner to the orders of the Commission of which review is hereby sought are as follows:

(a) Section 11(b)(2) of the Act, and the proceed-

ing instituted and conducted by the Commission thereunder, are unconstitutional and void in that,

(i) Said Section 11(b)(2) is not a regulation of commerce, nor on the subject of bankruptcies, nor for the establishment of post offices and post roads, within the meaning of the applicable clauses of Article I, Section 8, of the Constitution of the United States, and is not within any other power vested in the Congress by said Constitution, but is an invasion of the powers reserved to the states or the people within the meaning of Article X of the Amendments to the Constitution of the United States in that it seeks to interfere with and control corporations with respect to matters which are of concern only to the States under whose Constitutions and local laws such corporations are created; it seeks to interfere with and control the exercise by such corporations of their charter powers granted by such States under such Constitutions and local laws; and it seeks to interfere with and control the distribution of voting power among security holders in corporations as established in pursuance of the respective Constitutions and local laws of such States.

(ii) The enforcement of said Section 11(b)(2) or of any order made by the Commission thereunder, which would require elimination of, or a change in the corporate structure of, your petitioner or any subsidiary company of your petitioner, or a redistribution of voting power among security holders of your petitioner or any subsidiary company of your petitioner, will result in an arbitrary destruction of property values in which your petitioner and its security holders have interests and will deprive your petitioner and its security holders of property with-

out due process of law in violation of Article V of the Amendments to the Constitution of the United States.

(iii) Said Section 11(b)(2) delegates to the Commission legislative power of the Congress in violation of Article I, Sections 1 and 8, of the Constitution of the United States in that it affords no guide or standard or definition for the determination of what form of corporate structure may be approved by the Commission, or be held by it to unduly or unnecessarily complicate the structure of a holding company system, or what is a fair or equitable distribution of voting power among security holders, but entrusts to the unlimited discretion of the Commission the determination of such broad, important and far reaching questions of policy and governmental regulation and control. The words are not referable to any grant of federal power and are merely an unlimited grant of power to the Commission to make such alterations or changes in corporate structure or distribution of voting power among security holders as the Commission may deem appropriate.

(iv) Section 11(b)(2) purports to authorize abrogation and restatement of contract rights among security holders of companies, including security holders of your petitioner. The act does not even require that such security holders be made parties to the proceedings in which their contract rights are to be so affected. They were not made parties to the proceedings in the instant case and many of them were not capable of being made parties. Such application and enforcement of the Act would deprive such non-respondent companies and security holders of property without due process of law, in violation

of Article V of the Amendments to the Constitution of the United States.

(v) Section 11(b)(2), as applied by the orders sought to be reviewed, is an *ex post facto* law in violation of Article I, Section 9, of the Constitution of the United States.

(b) If, notwithstanding the foregoing, the said Section 11(b)(2) may be constitutionally applied, it may be so applied only (i) in the administration of a constitutional grant of power to the Commission to regulate corporations engaged in interstate commerce, and then only in so far as its application may constitute a regulation of interstate commerce within the powers granted to the Congress under the provisions of Article I, Section 8, of the Constitution of the United States, and neither your petitioner, nor any of its subsidiaries, is either in its corporate existence or structure or in the distribution of voting rights of its security holders within the orbit of such power; (ii) in the administration and exercise of the bankruptcy powers conferred upon the Congress by Article I, Section 8, of the Constitution of the United States, and neither your petitioner nor its subsidiaries are either insolvent or bankrupt or subject to such bankruptcy powers; or (iii) as auxiliary to a valid order made by the Commission under Section 11(b)(1) of the Act (if said Section be constitutional, which your petitioner denies) after or in connection with the making of a valid order under said Section 11(b)(1) which requires a revamping of corporate structure or the elimination of some company or redistribution of voting power among security holders to effectuate the purposes of said Section 11(b)(1).

(c) For the reasons, among others, stated in para-

graph (b)(iii), *supra*, the Commission was without power to proceed with hearing in the proceeding under Section 11(b)(2), except after the completion of, or as auxiliary to, or in conjunction with, its proceeding under Section 11(b)(1) which is pending before the Commission.

(d) The notice and order for hearing by which the Commission instituted the proceeding was defective for want of necessary parties, in that subsidiary companies of your petitioner named in said notice and order and whose position in the System and the voting rights of whose securities in the System would necessarily be considered and affected were not made parties; and further in that security holders of the companies affected whose rights would necessarily be involved were likewise not made parties. The orders of the Commission sought to be reviewed necessarily affect contract and property rights of individual and corporate holders of such securities, and could not be made in a proceeding to which said security holders are not parties.

(e) The orders sought to be reviewed which direct that your petitioner's existence shall be terminated and that it shall be dissolved for the reason that your petitioner's "corporate structure and continued existence * * * unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of the holding-company system of Electric Bond and Share Company" were beyond the power of the Commission under the Act and such application by the Commission of Section 11(b)(2) of the Act deprives your petitioner, its security holders, its subsidiaries and their security holders, of property without due process of law, in

violation of Article V of the Amendments to the Constitution of the United States.

(f) Your petitioner should not be dissolved in order to insure that the structure of the holding company system of Electric Bond and Share Company shall not be unduly or unnecessarily complicated or that voting power shall not be unfairly or inequitably distributed among security holders of that System, since such dissolution would deprive your petitioner, its security holders, its subsidiaries, and their security holders, of property and property rights without due process of law in violation of Article V of the Amendments to the Constitution of the United States.

(g) The dissolution of your petitioner is not an appropriate remedy to carry out the requirements of the Act or to give effect to the intent of Congress as expressed in the Act.

(h) The orders hereby sought to be reviewed are not in conformity with Section 11(b)(2) which provides that it shall be the duty of the Commission "as soon as practicable after January 1, 1938" to require steps to be taken as set forth in that Section. Said orders should not have been made since it is not "practicable" at this time to require the acts provided for therein in view of the effect of the present emergency created by the war including the depressed condition of financial markets and the present uncertainties and difficulties of our national economy.

(i) The Commission erred in overruling and denying your petitoner's motion to dismiss the Commission's notice of and order for hearing and the proceedings thereunder, made at the conclusion of the Commission's case and renewed at or near the conclusion of the hearings.

(j) The Commission erred in denying the motion of your petitioner to consolidate the application of your petitioner for approval of said plan of reorganization filed under Section 11(e) of the Act with the said proceedings under Section 11(b)(2) of the Act.

(k) The Commission erred in its findings and conclusions (on which its orders are based) that the corporate structure and continued existence of your petitioner unduly and unnecessarily complicates the structure of the Electric Bond and Share Company holding company system, and unfairly and inequitably distributes voting power among the security holders of such system.

(l) The Commission erred in its findings and conclusions (on which its orders are based) that to effect the requirements of Section 11(b)(2) of the Act it is necessary that your petitioner's existence be terminated and that said company be dissolved.

(m) The Commission erred in its findings and conclusions (on which its orders are based) to the effect that the plan of reorganization filed by your petitioner under Section 11(e) of the Act is defective and not entitled to consideration prior to the entry of said order.

Wherefore your petitioner, Electric Power & Light Corporation, respectfully prays (a) that this Honorable Court take jurisdiction over the parties and subject matter of this petition; (b) that a copy hereof be served upon the respondent Commission, as prescribed by law; (c) that this Honorable Court review the said orders of the respondent Commission, dated August 22, 1942 and August 28, 1942, respectively, and upon such review set aside said orders in whole; and (d) that this Honorable Court grant your peti-

tioner such other and further relief as may be deemed just and proper in the premises.

And your petitioner will ever pray.

Respectfully submitted,

ELECTRIC POWER & LIGHT CORPORATION,
By JOE H. GILL, *President.*

Attest: E. H. DIXON, *Secretary.*
[CORPORATE SEAL.]
Dated October 19, 1942.

WRIGHT, GORDON, ZACHRY, PARLIN & CAHILL,
63 Wall Street, New York, N. Y.
Attorneys for Petitioner
By R. GRAHAM HEINER, *A Partner.*

BOYKIN C. WRIGHT,
R. GRAHAM HEINER,
DANIEL JAMES,
of Counsel.

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

JOE H. GILL, being duly sworn, deposes and says that he is President of ELECTRIC POWER & LIGHT CORPORATION and that he has read the above petition by him subscribed and knows the contents thereof, and that the same is true of his own knowledge.

JOE H. GILL.

Sworn to before me this nineteenth day of October, 1942.

ALICE M. POWELL,
[NOTARIAL SEAL] Notary Public, Queens County

Queens Co. Clk's No. 4173,
Certificates Filed in
N. Y. Co. Clk's No. 731, Reg. No. 3P441
Westchester County Clerk
Commission Expires March 30, 1943

APPENDIX A.

ORDER REQUIRING DISSOLUTION OF ELECTRIC POWER & LIGHT CORPORATION.

August 22, 1942.

[MEMORANDUM: This order of dissolution is here omitted as it is printed as part of the Transcript of Record, page 652 *infra*. A. I. CHARRON, *Clerk*.]

APPENDIX B.

ORDER DENYING PETITION TO VACATE AND SET ASIDE ORDER OF AUGUST 22, 1942, AND FOR REHEARING.

August 28, 1942.

[MEMORANDUM: This order is here omitted as it is printed as part of the Transcript of Record, page 679 *infra*. A. I. CHARRON, *Clerk*.]

TRANSCRIPT OF RECORD.

[Filed in Circuit Court of Appeals November 30, 1942.]

(Portions designated by Stipulation of the Parties.)

[Document No. 1.]

Mailed for Service May 10, 1940.

United States of America

Before the Securities and Exchange Commission

At a regular session of the Securities and Exchange Commission, held at its office in the City of Washington, D. C., on the ninth day of May, A. D., 1940.

Reg. No. Docket Unit 977761-977770.

In the Matter of

Electric Bond and Share Company,
American Power & Light Company,
Pacific Power & Light Company,
Electric Power & Light Corporation,
Utah Power & Light Company,
National Power & Light Company,
American & Foreign Power Company, Inc.,
Ebasco Services Incorporated,

Respondents.

File No. 59-12.

NOTICE OF AND ORDER FOR HEARING PURSUANT TO SECTION 11 (b) (2) OF THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935.

The Commission having examined the corporate structure of Electric Bond and Share Company, a registered holding company, and its subsidiary companies, the relationships

among the companies in the holding company system of said Electric Bond and Share Company, the character of the interests thereof and the properties owned or controlled thereby, and the Commission having reasonable grounds to believe that:

I.

1. Electric Bond and Share Company, a registered holding company, is a corporation organized under the laws of the State of New York and maintains principal offices for the doing of business in the City of New York, State of New York.

2. As of December 31, 1938, the capitalization of said Electric Bond and Share Company was as follows:

Type of Security.	Amount Outstanding.	Par or Stated Value.
$5 Preferred Stock, Cumulative, No Par	300,000 shares	$ 30,000,000.00
$6 Preferred Stock, Cumulative, No Par	1,155,655 shares	115,565,500.00
Common Stock, $5 Par	5,267,164+ shares	26,335,733.78

3. Each share of stock of each of the above classes is entitled to one vote with respect to ordinary business of the corporation. The $5 Preferred Stock and $6 Preferred Stock have equal rank as to dividends and in liquidation, and have a liquidating value of $100 per share plus unpaid cumulative dividends. Dividends have been regularly declared and paid on both classes of preferred stock. No dividends of any kind have been declared or paid on the common stock since January 16, 1933; no dividends in cash have been declared or paid on the common stock since organization of the present company in 1929.

4. The following are subsidiary companies of said Electric Bond and Share Company and are also registered holding companies within the meaning of the Public

Utility Holding Company Act of 1935 (hereinafter referred to as the Act):

Name.	State of Organization.
American Power & Light Company	Maine
Pacific Power & Light Company	Maine
Electric Power & Light Corporation	Maine
Utah Power & Light Company	Maine
National Power & Light Company	New Jersey
American & Foreign Power Company Inc.	Maine

In addition, said Electric Bond and Share Company directly or indirectly owns, controls, or holds with power to vote, more than 10 per centum of the outstanding voting securities of American Gas and Electric Company, a registered holding company. An application pursuant to Section 2 (a) (8) of the Act for an order declaring that neither American Gas and Electric Company nor any of its subsidiary companies is a subsidiary company of Electric Bond and Share Company is now pending before the Commission. The effect of the filing of such an application is indicated in paragraph 45 below.

5. The following are subsidiary companies of said Electric Bond and Share Company and are engaged in the businesses respectively set forth opposite their names:

Name.	Place of Organization.	Nature of Business.
Ebasco Services Incorporated	New York	Service company
Two Rector Street Corporation	New York	Real estate
Emprezas Electricas Brasileiras, S.A.	Brazil	Service company
Compania Constructora del Pacifico	Chile	Construction company

6. The number of shares of capital stock and option warrants of each of the registered holding companies named

in paragraph 4 which were directly owned by said Electric Bond and Share Company as of December 31, 1938 was as follows:

	Owned by Electric Bond and Share Company	
	Number of Shares.	Percent of Total Outstanding.
American Power & Light Company		
$5 Preferred Stock	51,840	5.30
Common Stock	937,221	31.10
Pacific Power & Light Company	none owned directly	
Electric Power & Light Corporation		
$7 Preferred Stock	485	.09
Second Preferred Stock, Series A ($7)	13,905	17.34
Common Stock	1,976,638	57.59
Option Warrants to Purchase Common Stock	393,408	70.72
Utah Power & Light Company	none owned directly	
National Power & Light Company		
Common Stock	2,540,450	46.56
American & Foreign Power Company Inc.		
$6 Preferred Stock	65,809	17.00
Preferred Stock ($7)	13,800	2.88
Second Preferred Stock, Series A ($7)	2,158,236	83.02
Common Stock	881,500	42.51
Option Warrants to Purchase Common Stock	5,812,884	87.39
American Gas and Electric Company		
Common Stock	846,986	18.89

In addition, said Electric Bond and Share Company owned substantial amounts of (a) other classes of securities of certain of said registered holding companies, (b) various securities of certain subsidiary companies, and (c) various securities of companies not in the holding company system of said Electric Bond and Share Company.

7. The consolidated assets of American Power & Light Company and its subsidiary companies are shown on the consolidated balance sheet as of December 31, 1938 at $828,116,495.28. As of the same date, the aggregate market value of voting securities of American Power & Light Company held by Electric Bond and Share Company was $7,697,951. The consolidated assets of Electric Power & Light Corporation and its subsidiary companies are shown on the consolidated balance sheet as of December 31, 1938 at $719,307,830.60. As of the same date, the aggregate market value of voting securities of Electric Power & Light Corporation held by Electric Bond and Share Company was $22,750,131. The consolidated assets of National Power & Light Company and its subsidiary companies are shown on the consolidated balance sheet as of December 31, 1938 at $583,370,009.85. As of the same date, the aggregate market value of voting securities of National Power & Light Company held by Electric Bond and Share Company was $20,958,712. The consolidated assets of American & Foreign Power Company Inc. and its subsidiary companies are shown on the consolidated balance sheet as of December 31, 1938 at $753,668,025.03. As of the same date, the aggregate market value of voting securities of American & Foreign Power Company Inc. held by Electric Bond and Share Company was $3,085,250. Since December 31, 1938, the market values of the voting securities of the aforementioned companies, except in the case of National Power & Light Company, have declined substantially.

8. As of December 31, 1938 the holding company system of Electric Bond and Share Company (not including American & Foreign Power Company Inc. and its subsidiary companies or American Gas and Electric Company and its subsidiary companies) served with elec-

tricity approximately 3,649 communities having an aggregate population of approximately 8,366,000, such communities being located in the States of

Alabama	Minnesota	Pennsylvania
Arizona	Mississippi	South Carolina
Arkansas	Missouri	Tennessee
Colorado	Montana	Texas
Florida	Nebraska	Utah
Idaho	Nevada	Washington
Iowa	New Mexico	Wisconsin
Kansas	North Carolina	Wyoming
Louisiana	Oregon	

As of December 31, 1938 the holding company system of Electric Bond and Share Company (not including American & Foreign Power Company Inc. and its subsidiary companies) served with gas approximately 407 communities having an aggregate population of approximately 3,209,000, such communities being located in the States of

Arizona	Oregon
Arkansas	Pennsylvania
Florida	Tennessee
Louisiana	Texas
Mississippi	Washington
Montana	Wisconsin

The holding company system of Electric Bond and Share Company through the medium of its various subsidiary companies is also engaged in various other businesses as set forth elsewhere herein.

9. A corporate chart showing the associate companies in the Electric Bond and Share Company holding company system and the percentages of voting control in said holding company system (not including American Gas

and Electric Company and its subsidiary companies and not including the subsidiary companies of American & Foreign Power Company Inc.) is attached hereto and marked Exhibit A and is made part hereof as if set out herein in full.

II.

10. American Power & Light Company, referred to in paragraph 4 above, a registered holding company, is a corporation organized under the laws of the State of Maine and maintains principal offices for the doing of business in the City of New York, State of New York.

11. As of December 31, 1938 the capitalization of said American Power & Light Company was as follows:

Type of Security.	Amount Outstanding.	Principal Amount, Par or Stated Value.
Funded Debt	$47,502,500.00	$47,502,500.00
Preferred Stock ($6) Cumulative, No Par	793,581+ shares	79,300,926.00
$5 Preferred Stock, Cumulative, No Par	978,444 shares	97,844,400.00
Common Stock, No Par	3,013,812 shares*	37,434,351.29

*Includir 5,301 shares reacquired.

The number of shares of each class of capital stock owned by Electric Bond and Share Company is stated in paragraph 6 above.

12. Each share of stock of each of the above classes is entitled to one vote with respect to ordinary business of the corporation. The Preferred Stock ($6) and the $5 Preferred Stock have equal rank as to dividends and in liquidation, and have a liquidating value of $100 per share plus unpaid cumulative dividends. As of December 31, 1938 unpaid cumulative dividends in arrears on the two classes of preferred stock totaled $30,167,306.25, representing slightly more than 3 years' requirements

on each class. The amount of such dividends in arrears has increased since December 31, 1938 by reason of the payment of only partial dividends during the year 1939. No dividends have been paid on the common stock since June 1, 1932.

13. The following are subsidiary companies of said Electric Bond and Share Company and of said American Power & Light Company and are public-utility companies within the meaning of the Act:

Name	State of Organization.	Nature of Business.
Central Arizona Light and Power Company	Arizona	Electric and Gas
Florida Power & Light Company	Florida	Electric, Gas, and Ice
Kansas Gas and Electric Company	West Virginia	Electric
Minnesota Power & Light Company	Minnesota	Electric and Heating
The Montana Power Company	New Jersey	Electric, Gas, Heating and Water
Nebraska Power Company	Maine	Electric
New Mexico Electric Service Company	New Mexico	Electric
Northern Power Company	Wisconsin	Electric
Northwestern Electric Company	Washington	Electric and Heating
Pacific Power & Light Company	Maine	Registered holding company, Electric, Heating, and Water
Inland Power & Light Company	Oregon	Electric
Portland Gas & Coke Company	Oregon	Gas
Superior Water, Light and Power Company	Wisconsin	Electric, Gas and Water
Texas Electric Service Company	Texas	Electric
Texas Power & Light Company	Texas	Electric
Texas Public Utilities Corporation	Texas	Electric, Natural gas, Ice, and Water
The Washington Water Power Company	Washington	Electric, Water and Heating

Said Inland Power & Light Company, in addition to being a subsidiary company of Electric Bond and Share Company and of American Power & Light Company, is a subsidiary company of said Pacific Power & Light Company, a registered holding company.

14. The following are subsidiary companies of said Electric Bond and Share Company and of said American Power & Light Company and are not public-utility companies within the meaning of the Act, but are engaged in the businesses respectively set forth opposite their names:

Name.	State of Organization.	Nature of Business.
Consumers Water Company	Florida	Water
The Miami Beach Railway Company	Florida	Transportation
Miami Water Company	Florida	Water
Glacier Production Company	New Jersey	Natural gas: petroleum products
Great Falls Townsite Company	Montana	Hotel and real estate ownership
Yakima Credit Corporation	Washington	Financing fruit marketing
Gasco Finance Company	Oregon	Financing gas appliances
Utilities Land Company	Florida	Real estate
Spokane United Railways	Washington	Transportation

Said Yakima Credit Corporation, in addition to being a subsidiary company of Electric Bond and Share Company and of American Power & Light Company, is a subsidiary company of Pacific Power & Light Company, a registered holding company.

15. As of December 31, 1938, unpaid cumulative dividends in arrears on preferred stocks of subsidiary companies of American Power & Light Company totaled $10,305,484.99, of which $1,668,960.90 was applicable to preferred stocks held by said American Power & Light Company. As of December 31, 1939, the amount of such unpaid cumulative dividends in arrears had decreased by approximately 7 percent.

16. The consolidated assets of American Power & Light Company and its subsidiary companies are shown on the consolidated balance sheet as of December 31, 1938 at $828,116,495.28. As of the same date, the aggregate par, stated, or assigned value (in some cases based upon liquidating preferences, not including dividend arrear-

ages, of senior classes of stock) of voting securities of the subsidiaries consolidated held by American Power & Light Company was approximately $203,931,000. In addition, said American Power & Light Company owned substantial amounts of other classes of securities of certain of its subsidiary companies.

17. Pacific Power & Light Company, referred to in paragraph 4 above, a registered holding company, is a corporation organized under the laws of the State of Maine and maintains principal offices for the doing of business in the City of Portland, State of Oregon.

18. As of December 31, 1938, the capitalization of said Pacific Power & Light Company was as follows:

Type of Security.	Amount Outstanding	Principal Amount, Par or Stated Value.
Funded Debt	$23,294,500.00	$23,294,500.00
7% Preferred Stock, Cumulative, $100 par	58,100 shares*	5,810,000.00
$6 Preferred Stock, Cumulative, No Par	10,585 shares	1,058,500.00
Common Stock, No Par	1,000,000 shares	7,000,000.00

*Including 1,676 shares reacquired.

As of December 31, 1938, American Power & Light Company owned $2,794,500 principal amount of said funded debt and all shares of said Common Stock. As of December 31, 1938, Electric Bond and Share Company owned $285,000 principal amount of said funded debt.

19. Each share of 7% Preferred Stock and each share of Common Stock of Pacific Power & Light Company is entitled to one vote with respect to ordinary business of the corporation. The $6 Preferred Stock has no general voting power. The 7% Preferred Stock and $6 Preferred Stock have equal rank as to dividends and in

liquidation, and have a liquidating value of $100 per share plus unpaid cumulative dividends. As of December 31, 1938, unpaid cumulative dividends in arrears on the two classes of preferred stock totaled $191,032.50. Since December 31, 1938, the cumulative dividends in arrears have been paid in full. No dividends have been paid on the Common Stock since December 31, 1931.

III.

20. Electric Power & Light Corporation, referred to in paragraph 4 above, a registered holding company, is a corporation organized under the laws of the State of Maine and maintains principal offices for the doing of business in the City of New York, State of New York.

21. As of December 31, 1938 the capitalization of said Electric Power & Light Corporation was as follows:

Type of Security.	Amount Outstanding.	Principal Amount, Par or Stated Value.
Funded debt	$31,980,930.67	$31,980,930.67
$7 Preferred Stock, Cumulative, No Par	515,135 shares*	
$6 Preferred Stock, Cumulative, No Par	255,430+ shares	
Second Preferred Stock, Series A ($7), Cumulative, No Par	80,189 shares	155,044,139.40
Common Stock, No Par	3,433,189 shares**	
Option Warrants (without expiration date) to purchase Common Stock	556,254 warrants	

*Including 973 shares reacquired.

**Including 902 shares reacquired.

The number of shares of each class of capital stock owned by Electric Bond and Share Company is stated in paragraph 6 above.

22. Each share of $7 Preferred Stock, $6 Preferred Stock, and Common Stock of Electric Power & Light Corporation is entitled to one vote with respect to ordinary business of the corporation. The Second Preferred Stock, Series A ($7), has no general voting power. The $7 Preferred Stock and $6 Preferred Stock have equal rank, prior to the Second Preferred Stock, Series A ($7), as to dividends and in liquidation, and have a liquidating value of $100 per share plus unpaid cumulative dividends. The Second Preferred Stock, Series A ($7), has a liquidating value of $100 per share plus unpaid cumulative dividends. As of December 31, 1938, unpaid cumulative dividends in arrears on the three classes of preferred stock totaled $35,434,388.92, representing slightly more than 6 years' requirements on the $7 Preferred Stock and $6 Preferred Stock, and approximately 6¾ years' requirements on the Second Preferred Stock, Series A ($7). The amount of such dividends in arrears has increased since December 31, 1938 by reason of the failure to declare or pay any dividends during the year 1939. No dividends have been paid on the Common Stock since May 2, 1932.

23. The following are subsidiary companies of said Electric Bond and Share Company and of said Electric Power & Light Corporation and are public-utility companies within the meaning of the Act:

Name.	State of Organization.	Nature of Business.
Arkansas Power & Light Company	Arkansas	Electric, Gas, Water, Ice and Heating
Dallas Power & Light Company	Texas	Electric
Idaho Power Company	Maine	Electric
Louisiana Power & Light Company	Florida	Electric, Gas, Water, Ice, and Transportation
Mississippi Power & Light Company	Florida	Electric, Gas, Water, Ice, and Transportation

Name.	State of Organization.	Nature of Business.
New Orleans Public Service Inc.	Louisiana	Electric, Gas, and Transportation
United Gas Corporation	Delaware	Gas
Utah Power & Light Company	Maine	Registered holding company, Electric, and Heating
Utah Light and Traction Company	Utah	Electric and Transportation
The Western Colorado Power Company	Colorado	Electric

The two last-named companies, in addition to being subsidiary companies of Electric Bond and Share Company and of Electric Power & Light Corporation, are subsidiary companies of said Utah Power & Light Company, a registered holding company.

24. The following are subsidiary companies of said Electric Bond and Share Company and of said Electric Power & Light Corporation and are not public-utility companies within the meaning of the Act, but are engaged in the businesses respectively set forth opposite their names:

Name.	Place of Organization.	Nature of Business.
Capital Transportation Company	Delaware	Transportation
White River Power Company	Arkansas	Ownership of hydro site
Dallas Railway & Terminal Company	Texas	Transportation
Gentilly Development Company, Inc.	Louisiana	Real estate
Northern Texas Company	Delaware	Ownership of leased transportation properties
Compania Mexicana de Gas, S.A.	Mexico	Natural gas
Credito Industrial de Monterrey, S.A.	Mexico	Commercial banking
Duval Texas Sulphur Company	Texas	Sulphur
Houston Gas Securities Company	Delaware	Ownership of securities
Union Producing Company	Delaware	Development; natural gas; petroleum products
Springhill Land Company, Incorporated	Louisiana	Real estate
United Gas Pipe Line Company	Delaware	Natural gas; gasoline extraction
Houston Gulf Gas Company	Delaware	Development; natural gas; crude oil
United Oil Pipe Line Company	Delaware	Transportation of crude oil

25. As of December 31, 1938, unpaid cumulative dividends in arrears on preferred stocks of subsidiary companies of Electric Power & Light Corporation totaled $68,404,-705.42, of which $45,621,103. was applicable to preferred stocks held by said Electric Power & Light Corporation. As of December 31, 1939, the amount of such unpaid cumulative dividends in arrears had increased by approximately 7 percent.

26. The consolidated assets of Electric Power & Light Corporation and its subsidiary companies are shown on the consolidated balance sheet as of December 31, 1938 at $719,307,830.60. As of the same date, the aggregate par, stated, or assigned value (in some cases based upon liquidating preferences, not including dividend arrearages, of senior classes of stock) of voting securities of the subsidiaries consolidated held by Electric Power & Light Corporation was approximately $196,932,000. In addition, said Electric Power & Light Corporation owned substantial amounts of other classes of securities of certain of its subsidiary companies.

27. Utah Power & Light Company, referred to in paragraph 4 above, a registered holding company, is a corporation organized under the laws of the State of Maine and maintains principal offices for the doing of business in the City of Salt Lake City, State of Utah.

28. As of December 31, 1938, the capitalization of said Utah Power & Light Company was as follows:

Type of Security.	Amount Outstanding.	Principal Amount, Par or Stated Value.
Funded debt	$39,343,000.00	$39,343,000.00
$7 Preferred Stock, Cumulative, No Par	207,605 shares	20,780,218.95
$6 Preferred Stock, Cumulative, No Par	41,921 shares	4,178,568.21
Common Stock, No Par	3,000,000 shares	30,000,000.00

As of December 31, 1938, Electric Power & Light Corporation owned 2,100 shares of said $7 Preferred Stock and all shares of said Common Stock. As of December 31, 1938, Electric Bond and Share Company owned $300,000 principal amount of said funded debt.

29. Each share of stock of each of the above classes is entitled to one vote with respect to ordinary business of the corporation. The $7 Preferred Stock and $6 Preferred Stock have equal rank as to dividends and in liquidation, and have a liquidating value of $100 per share plus unpaid cumulative dividends. As of December 31, 1938 unpaid cumulative dividends in arrears on the two classes of preferred stock totaled $6,961,107.42, representing slightly more than 4 years' requirements on each class. As of December 31, 1939, the amount of such unpaid cumulative dividends in arrears had increased by approximately 8 percent. No dividends have been paid on the common stock since February 29, 1932.

IV.

30. National Power & Light Company, referred to in paragraph 4 above, a registered holding company, is a corporation organized under the laws of the State of New Jersey, and maintains principal offices for the doing of business in the City of New York, State of New York.

31. As of December 31, 1938, the capitalization of said National Power & Light Company was as follows:

Type of Security.	Amount Outstanding.	Principal Amount, Par or Stated Value.
Funded debt	$21,803,000.00	$21,803,000.00
$6 Preferred Stock, Cumulative, No Par	279,716 shares	
Common Stock, No Par	5,456,117 shares	125,839,094.67

The number of shares of each class of stock owned by Electric Bond and Share Company is stated in paragraph 6 above.

32. Each share of common stock is entitled to one vote with respect to ordinary business of the corporation. The $6 Preferred Stock has no general voting power. The $6 Preferred Stock has a liquidating value of $100 per share plus unpaid cumulative dividends. Dividends have been regularly declared and paid on both the $6 Preferred Stock and the Common Stock.

33. The following are subsidiary companies of said Electric Bond and Share Company and of said National Power & Light Company and are public-utility companies within the meaning of the Act:

Name.	State of Organization.	Nature of Business.
Birmingham Electric Company	Alabama	Electric, Transportation, and Heating
Carolina Power & Light Company	North Carolina	Electric and Transportation
The Edison Illuminating Company of Easton	Pennsylvania	Electric
Houston Lighting & Power Company	Texas	Electric
Lehigh Valley Transit Company	Pennsylvania	Electric and Transportation
Memphis Generating Company	Tennessee	Electric
Pennsylvania Power & Light Company	Pennsylvania	Electric, Gas, and Heating
Roanoke River Power Company	Virginia	Electric; ownership of development site
West Tennessee Gas Company	Florida	Gas

34. The following are subsidiary companies of said Electric Bond and Share Company and of said National Power & Light Company and are not public-utility companies within the meaning of the Act, but are engaged in the businesses respectively set forth opposite their names:

Name.	State of Organization.	Nature of Business.
Capitan Corporation	Tennessee	Real estate
Easton Transit Company	Pennsylvania	Ownership and leasing of transportation property
Easton and South Bethlehem Transportation Company	Pennsylvania	Transportation
Freemansburg Land Company	Pennsylvania	Real estate

Name.	State of Organization.	Nature of Business.
Allentown Bridge Company	Pennsylvania	Toll bridge
Lehigh Valley Realty Company	Pennsylvania	Real estate
Lehigh Valley Transportation Company	Pennsylvania	Transportation
Norristown Transit Company	Pennsylvania	Ownership and leasing of transportation property
Hazle Township Water Company	Pennsylvania	Water
Hummelstown Water Supply Company	Pennsylvania	Water
North Branch Development Company	Pennsylvania	Natural gas
Pennsylvania Realty & Investment Company	Pennsylvania	Real estate and Investments
West Pittston-Exeter Railroad Company	Pennsylvania	Short-line railroad
Susquehanna Gas Company	Pennsylvania	Natural gas pipe line
South Texas Utilities Company	Texas	Water and Ice
Tennessee Public Service Company	Maine	In process of liquidation
Valley Railways	Pennsylvania	Ownership of non-utility assets
Wrightsville Water Supply Company	Pennsylvania	Water

35. As of December 31, 1938, unpaid cumulative dividends in arrears on preferred stocks of subsidiary companies of National Power & Light Company (other than Tennessee Public Service Company which is in process of liquidation) totaled $6,123,771.67, of which $5,835,433.33 was applicable to preferred stocks held by said National Power & Light Company. As of December 31, 1939, the amount of such unpaid cumulative dividends in arrears had increased by approximately 4 percent.

36. The consolidated assets of National Power & Light Company and its subsidiary companies are shown on the consolidated balance sheet as of December 31, 1938 at $583,370,009.85. As of the same date, the aggregate par, stated, or assigned value (in some cases based upon liquidating preferences, not including dividend arrearages, of senior classes of stock) of voting securities of the subsidiaries consolidated held by National Power

& Light Company was approximately $79,882,000 (pro forma to reflect liquidation of Lehigh Power Securities Corporation in 1939). In addition, said National Power & Light Company owned substantial amounts of other classes of securities of certain of its subsidiary companies.

V.

37. American & Foreign Power Company Inc., referred to in paragraph 4 above, a registered holding company, is a corporation organized under the laws of the State of Maine and maintains principal offices for the doing of business in the City of New York, State of New York.

38. As of December 31, 1938, the capitalization of said American & Foreign Power Company Inc. was as follows:

Type of Security.	Amount Outstanding.	Principal Amount, Par or Stated Value.
Funded debt	$111,500,000.00	$111,500,000.00
Preferred Stock ($7), Cumulative, No Par	478,995 shares	393,939,972.38
$6 Preferred Stock, Cumulative, No Par	387,025+ shares	
Second Preferred Stock, Series A ($7) Cumulative, No Par	2,599,611 shares	
Common Stock, No Par	2,073,738 shares	
Option Warrants (without expiration date) to purchase Common Stock	6,651,994+ warrants	
Allotment Certificates for Preferred Stock ($7)		480.00

The number of shares of each class of capital stock owned by Electric Bond and Share Company is stated in paragraph 6 above. As of December 31, 1938, Electric Bond and Share Company owned $40,300,000 prin-

cipal amount of the funded debt of American & Foreign Power Company Inc.

39. Each share of common stock of American & Foreign Power Company Inc. is entitled to one vote with respect to ordinary business of the corporation. The Preferred Stock ($7), the $6 Preferred Stock, and the Second Preferred Stock, Series A ($7), have no general voting power. The Preferred Stock ($7) and the $6 Preferred Stock have equal rank, prior to the Second Preferred Stock, Series A ($7), as to dividends and in liquidation, and have a liquidating value of $100 per share plus unpaid cumulative dividends. The Second Preferred Stock, Series A ($7), has a liquidating value of $100 per share plus unpaid cumulative dividends. As of December 31, 1938 unpaid cumulative dividends in arrears on the three classes of preferred stock totaled $189,851,035.85, representing approximately 7 years' requirements on the Preferred Stock ($7) and the $6 Preferred Stock, and approximately 8¼ years on the Second Preferred Stock, Series A ($7). The amount of such dividends in arrears has increased since December 31, 1938 by reason of the failure to declare or pay any dividends during the year 1939. No dividends have been paid on the Common stock since organization of the company in 1923.

40. Approximately 112 companies, of which 25 are incorporated under the laws of States of the United States or under the China Trade Act, are subsidiary companies of said American & Foreign Power Company Inc., and of Electric Bond and Share Company. Neither American & Foreign Power Company Inc. nor any of its subsidiary companies owns or operates any facilities used for the generation, transmission, or distribution of electric energy for sale within the United States,

or any facilities used for the distribution at retail of natural or manufactured gas for heat, light, or power within the United States. Approximately 81 subsidiary companies of American & Foreign Power Company Inc. and of Electric Bond and Share Company are public-utility companies in the countries of Argentina, Brazil, Chile, China, Colombia, Costa Rica, Cuba, Ecuador, Guatemala, India, Mexico, Panama, and Venezuela. The holding company system of American & Foreign Power Company Inc. through the medium of its various subsidiary companies is also engaged in various other businesses in said foreign countries.

41. Several of the subsidiary companies of American & Foreign Power Company Inc. themselves have subsidiary companies which are holding companies. The following subsidiary companies of American & Foreign Power Company Inc. and of Electric Bond and Share Company have outstanding securities which are held by investors within the United States:

Name	Place of Organization.
Central Mexico Light and Power Company	Maine
The Guanajuato Power and Electric Company	Colorado
Panama Power & Light Company	Florida
Far East Power Corporation	Delaware
Havana Electric & Utilities Company	Maine
Mexican Utilities Company	Maine
Mexicana Electric Companies, Inc.	Delaware
The Northern Mexico Power and Development Company, Limited	Canada

42. The Commission has partially exempted said American & Foreign Power Company Inc. from various provisions of the Act applicable to it as a subsidiary company of Electric Bond and Share Company, and has exempted certain subsidiary companies of said Ameri-

can & Foreign Power Company Inc. which are holding companies from all provisions of the Act which would require them to register as such, and has partially exempted all subsidiary companies of said American & Foreign Power Company, Inc. from various provisions of the Act applicable to them as subsidiary companies of Electric Bond and Share Company and American & Foreign Power Company Inc.

VI.

43. American Gas and Electric Company, referred to in paragraph 4 above, is a corporation organized under the laws of the State of New York, and maintains principal offices for the doing of business in the City of New York, State of New York. Approximately 26 companies are subsidiary companies of said American Gas and Electric Company. The holding company system of American Gas and Electric Company serves with electricity approximately 1,655 communities having an aggregate population of approximately 3,187,000, such communities being located in nine States of the United States. In addition to the proceedings pursuant to Section 2 (a) (8) of the Act, referred to in paragraph 4 above, proceedings are pending before the Commission, pursuant to a Notice of and Order for Hearing dated December 1, 1939 (Holding Company Act Release No. 1815, File Numbers 54-9 and 59-2), to determine issues arising under an application filed by said American Gas and Electric Company pursuant to Section 11 (e) of the Act and, in general, to determine the action, if any, which American Gas and Electric Company and its subsidiary companies shall be required to take in order to comply with the provisions of Section 11 (b) (1) and Section 11 (b) (2) of the Act relating to simplification of holding-company systems.

VII.

44. Ebasco Services Incorporated, referred to in paragraph 5 above, is a subsidiary service company, all of whose outstanding securities are owned by Electric Bond and Share Company. Said Ebasco Services Incorporated maintains principal offices for the doing of business in the City of New York, State of New York, and performs service, sales, and construction contracts for associate companies in the holding company system of Electric Bond and Share Company, but does not perform service, sales, or construction contracts for companies in the holding company system of American Gas and Electric Company.

VIII.

45. In addition to the subsidiary companies listed in paragraphs 4, 5, 13, 14, 23, 24, 33 and 34 above, and those referred to in paragraph 40 above, various inactive companies are subsidiary companies of Electric Bond and Share Company and of one of its subsidiary companies listed in paragraph 4 above. In addition, more than 10 percentum of the outstanding voting securities of certain other companies not listed in the above paragraphs are directly or indirectly owned, controlled, or held with power to vote, by certain of the subsidiary companies of Electric Bond and Share Company, but applications pursuant to Section 2 (a) (8) of the Act for orders declaring such companies not to be subsidiary companies of Electric Bond and Share Company or of such other company or companies are now pending before the Commission. Said Section 2 (a) (8) provides that the filing of an application thereunder in good faith shall exempt the applicant from any obligation, duty, or liability imposed in the Act upon the ap-

plicant as a subsidiary company of a specified holding company until the Commission has acted upon such application. Rule U-3D-3 of the General Rules and Regulations under the Act provides that the filing of such an application in good faith shall also exempt any company which is a subsidiary company of an applicant, and which would not be a subsidiary company of the specified holding company under clause (A) of Section 2 (a) (8) if its relationships with such applicant were disregarded, from the obligations, duties and liabilities imposed by any provision of the Act or of the rules and regulations upon such company as a subsidiary company of such specified holding company, until the Commission has denied the application or has otherwise ordered.

IX.

And the Commission further having reasonable grounds to believe that:

46. The structure of the holding company system of said Electric Bond and Share Company is unduly and unnecessarily complicated.

47. Voting power is unfairly and inequitably distributed among security holders of the holding company system of said Electric Bond and Share Company.

48. Said Electric Bond and Share Company is a holding company with respect to certain subsidiary companies which themselves have subsidiary companies which are holding companies.

X.

WHEREFORE IT IS ORDERED that the said Electric Bond and Share Company, American Power & Light Company, Pacific Power & Light Company, Electric Power & Light Corporation, Utah Power & Light Company, National

Power & Light Company, American & Foreign Power Company Inc. and Ebasco Services Incorporated shall be made respondents herein, and that pursuant to Section 11 (b) (2) of the said Public Utility Holding Company Act of 1935 a hearing shall be held at the offices of the Securities and Exchange Commission, 1778 Pennsylvania Avenue, N.W., Washington, D. C., at 10 A.M. on the tenth day of June, 1940 (or such later date as the Commission may prior thereto fix by supplementary notice), to determine (1) whether the allegations of Parts I to IX hereof, inclusive, are true and accurate; (2) whether it is necessary to discontinue the existence of, or modify the corporate structure of, or redistribute the voting power among security holders of, said Electric Bond and Share Company or any of the other respondents herein; (3) what further action, if any, is necessary and shall be required to be taken by the respondents herein, or any of them, in order that each of the respondents herein which is a registered holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company, and (4) what further action, if any, is necessary and shall be required to be taken by the respondents herein, or any of them, to ensure that the corporate structure or continued existence of any of the respondents herein does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of the holding company system of Electric Bond and Share Company; and

It is further ordered that the Secretary of the Commission shall serve notice of the hearing aforesaid by mailing a copy of this order by registered mail to said Electric Bond and Share Company and to each of its subsidiary companies, aforementioned, which are respondents herein, such mailing to be made not less than thirty days prior to the date hereinbefore fixed as the date of hearing; and that

notice is hereby given of said hearing to the said respondents and to all other persons, including the security holders and consumers of the said respondents, the subsidiary companies of the said respondents, all States, municipalities and political subdivisions of States within which are located any of the utility assets of the Electric Bond and Share Company holding company system or under the laws of which any of the respondents or their subsidiary companies are incorporated, all State commissions, State securities commissions and all agencies, authorities or instrumentalities of one or more States, municipalities, or other political subdivisions having jurisdiction over any of the respondents or their subsidiary companies or over any of the businesses, affairs or operations of any of them, and that such notice shall be given further by general release of the Commission, distributed to the press and mailed to the mailing list for releases issued under the Public Utility Holding Company Act of 1935. Further notice shall be given to all persons by publication in the Federal Register, not later than thirty days prior to the date hereinbefore fixed as the date of hearing, of a notice as follows:

NOTICE OF HEARING UNDER SECTION 11 (b) (2) OF THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935 WITH RESPECT TO THE HOLDING-COMPANY SYSTEM OF ELECTRIC BOND AND SHARE COMPANY.

Notice is hereby given that the Securities and Exchange Commission adopted an order on the 9th day of May, 1940 directing that a hearing pursuant to Section 11 (b) (2) of the Public Utility Holding Company Act of 1935 be held with respect of Electric Bond and Share Company, American Power & Light Company, Pacific Power & Light Company, Electric Power & Light Corporation, Utah Power & Light Company, National Power & Light Company, Ameri-

can & Foreign Power Company Inc. and Ebasco Services Incorporated, hereinafter called the respondents, at the offices of the said Securities and Exchange Commission, 1778 Pennsylvania Avenue, N.W., Washington, D. C., at 10 A.M. on the tenth day of June, 1940 (or such later date as the Commission may prior thereto fix by supplementary notice).

Said order recites that it appears to the Commission that (a) the structure of the holding company system of said Electric Bond and Share Company is unduly and unnecessarily complicated; (b) voting power is unfairly and inequitably distributed among security holders of the holding company system of said Electric Bond and Share Company; and (c) said Electric Bond and Share Company is a holding company with respect to certain subsidiary companies which themselves have subsidiary companies which are holding companies.

Said order further provides that the purpose of such hearing is to determine (1) whether the allegations of Parts I to IX, inclusive, of said order are true and accurate; (2) whether it is necessary to discontinue the existence of, or modify the corporate structure of, or redistribute the voting power among security holders of, said Electric Bond and Share Company, or any of the other respondents in said proceedings; (3) what further action, if any, is necessary and shall be required to be taken by the said respondents, or any of them, in order that each of the said respondents which is a registered holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company; and (4) what further action, if any, is necessary and shall be required to be taken by the said respondents, or any of them, to ensure that the corporate structure or continued existence of any of the said respondents does not unduly or unnecessarily complicate the struc-

ture, or unfairly or inequitably distribute voting power among security holders, of the holding company system of Electric Bond and Share Company.

Reference is made to said notice and order for hearing for a more complete statement of the various matters to be determined at said hearing, and a copy of said notice and order for hearing is on file and open to public inspection at the offices of said Securities and Exchange Commission in Washington, D. C., and in each of the Regional Offices of said Securities and Exchange Commission, and a copy of said notice and order for hearing may be had upon written request to the Secretary of said Commission, and said notice and order for hearing is hereby made a part of this notice as if more fully herein set forth at length.

Notice of the aforesaid hearing is particularly given to each of the aforesaid respondents, Electric Bond and Share Company, American Power & Light Company, Pacific Power & Light Company, Electric Power & Light Corporation, Utah Power & Light Company, National Power & Light Company, American & Foreign Power Company Inc., and Ebasco Services Incorporated, and to all other persons, including the security holders and consumers of the said respondents, the subsidiary companies of the said respondents, all States, municipalities, and political subdivisions of States within which are located any of the utility assets owned or operated by the Electric Bond and Share Company holding company system or under the laws of which any of the respondents or their subsidiary companies are incorporated, all State Commissions, State securities commissions and all agencies, authorities or instrumentalities of one or more States, municipalities or other political subdivisions having jurisdiction over any of the respondents or their subsidiary companies or over any of the businesses, affairs or operations of any of them.

Said order further provides that any person proposing

to intervene in said proceedings shall file with the Secretary of the Securities and Exchange Commission on or before the third day of June, 1940, his request or application therefor as provided by Rule XVII of the Rules of Practice of the said Securities and Exchange Commission.

By order of the Securities and Exchange Commission this ninth day of May, 1940.

FRANCIS P. BRASSOR, *Secretary.*

[SEAL]

It is further ordered that any person proposing to intervene in these proceedings shall file with the Secretary of the Commission on or before the third day of June, 1940, his request or application therefor as provided by Rule XVII of the Rules of Practice.

By the Commission.

FRANCIS P. BRASSOR, *Secretary.*

[Document No. 4.]

Received for filing May 31, 1940.

United States of America

Before The

Securities and Exchange Commission.

In the Matter of

Electric Bond and Share Company,
American Power & Light Company,
Pacific Power & Light Company,
Electric Power & Light Corporation,
Utah Power & Light Company,
National Power & Light Company,
American & Foreign Power Company, Inc.,
Ebasco Services Incorporated,

Respondents.

File No. 59-12.

APPLICATION WITH RESPECT TO NOTICE OF AND ORDER FOR HEARING PURSUANT TO SECTION 11 (b) (2) OF THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935.

The respondents named in the notice of and order for hearing dated the ninth day of May, 1940, in the above entitled matter (hereinafter referred to as the "notice and order"), by their attorneys, Simpson Thacher & Bartlett and Reid & Priest, respectfully show:

(1) The notice and order provides for a hearing thereon "at 10 A.M. on the tenth day of June, 1940 (or such later date as the Commission may prior thereto fix by supplementary notice), * * *." The purposes for which said hearing is to be held, as stated in the notice and order, are

"to determine (1) whether the allegations of Parts I to IX hereof, inclusive, are true and accurate; (2)

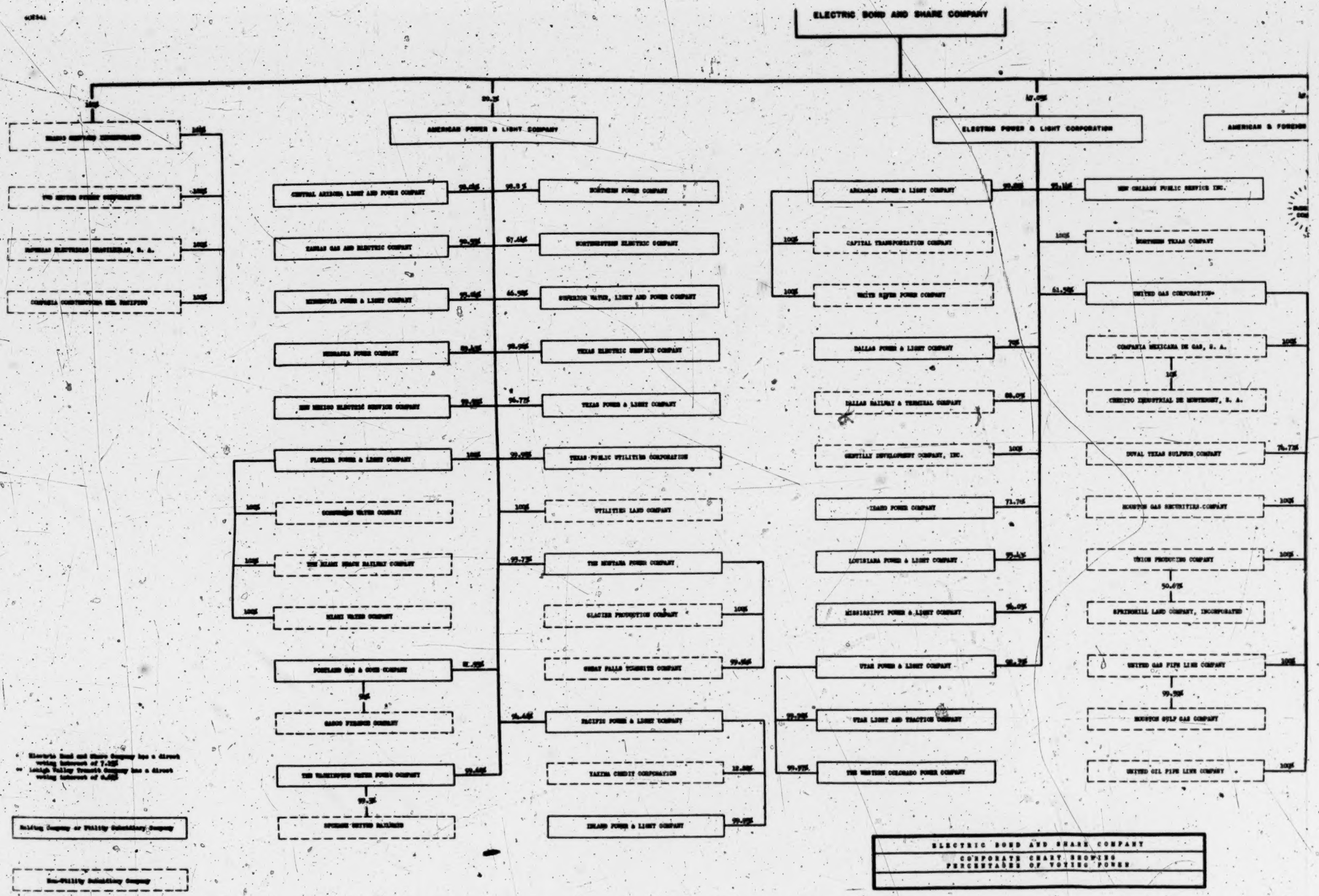
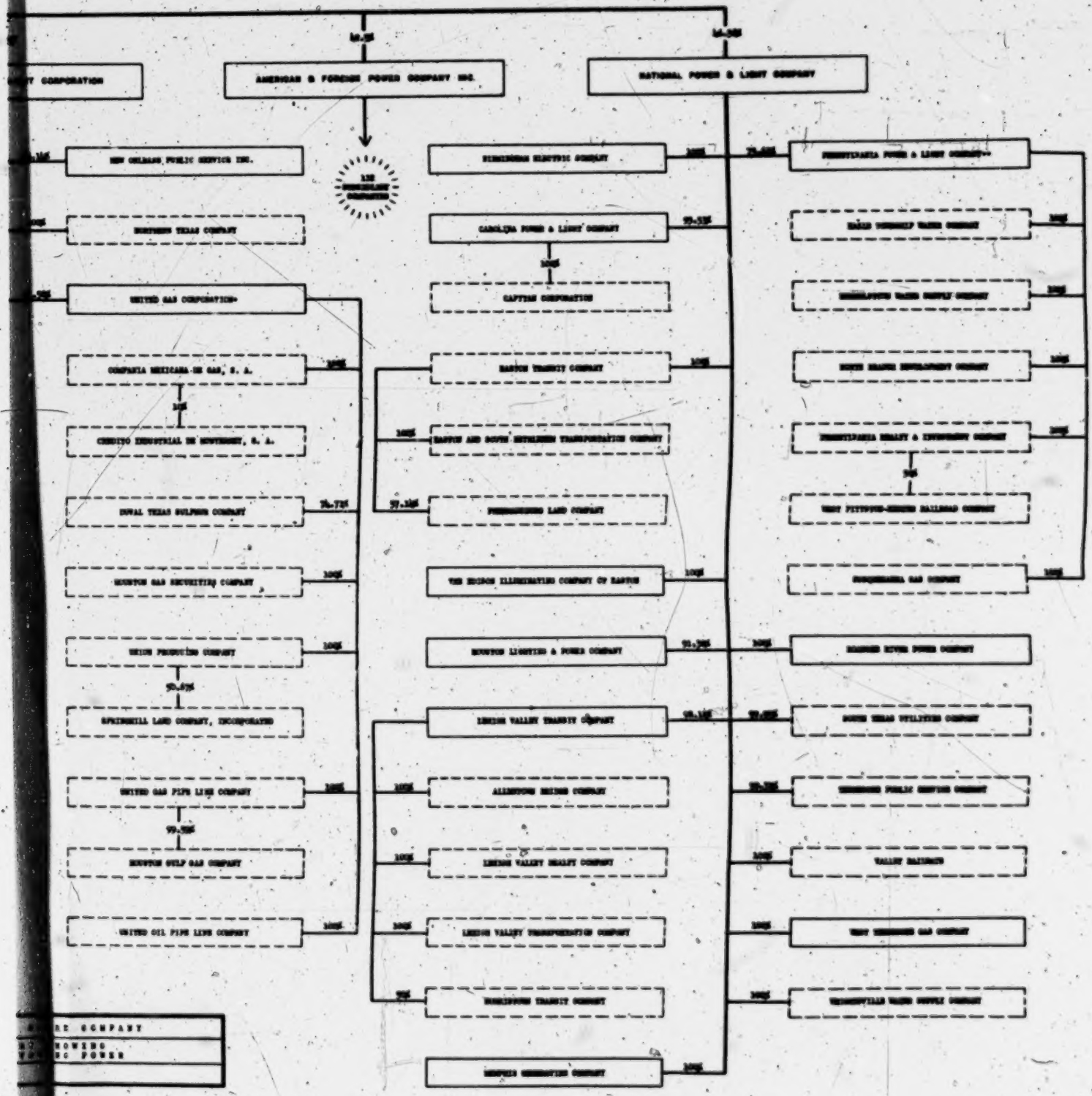

ELECTRIC BOND AND SHARE COMPANY
AMERICAN POWER & LIGHT COMPANY
ELECTRIC POWER & LIGHT CORPORATION
CENTRAL ARIZONA LIGHT AND POWER COMPANY
TAMPA GAS AND ELECTRIC COMPANY
MINNESOTA POWER & LIGHT COMPANY
NEBRASKA POWER COMPANY
NEW MEXICO ELECTRIC SERVICE COMPANY
FLORIDA POWER & LIGHT COMPANY
COMMERCIAL WATER COMPANY
THE SAINT MARYS BAILWAY COMPANY
SAINT WATER COMPANY
PORTLAND GAS & COKE COMPANY
SANDY FERRIES COMPANY
THE WASHINGTON WATER POWER COMPANY
SPOKANE UNITED RAILWAYS
NORTHERN POWER COMPANY
NORTHWESTERN ELECTRIC COMPANY
SUPERIOR WATER, LIGHT AND POWER COMPANY
TEXAS ELECTRIC SERVICE COMPANY
TEXAS POWER & LIGHT COMPANY
TEXAS PUBLIC UTILITIES CORPORATION
UTILITIES LAND COMPANY
THE MONTANA POWER COMPANY
GLACIER PRODUCTION COMPANY
GREAT FALLS TRIBUNE COMPANY
PACIFIC POWER & LIGHT COMPANY
YAKIMA CREDIT CORPORATION
INLAND POWER & LIGHT COMPANY
ARKANSAS POWER & LIGHT COMPANY
CAPITAL TRANSPORTATION COMPANY
WHITE RIVER POWER COMPANY
DALLAS POWER & LIGHT COMPANY
DALLAS RAILWAY & TERMINAL COMPANY
GENTILLY DEVELOPMENT COMPANY, INC.
IDAHO POWER COMPANY
LOUISIANA POWER & LIGHT COMPANY
MISSISSIPPI POWER & LIGHT COMPANY
TEXAS POWER & LIGHT COMPANY
TEXAS LIGHT AND TRACTION COMPANY
THE WESTERN COLORADO POWER COMPANY
NEW ORLEANS PUBLIC SERVICE INC.
NORTHERN TEXAS COMPANY
UNITED GAS CORPORATION*
COMPANIA MEXICANA DE GAS, S. A.
CREDITO INDUSTRIAL DE MONTERREY, S. A.
DUVAL TEXAS SULPHUR COMPANY
HOUSTON GAS SECURITIES COMPANY
UNION PRODUCING COMPANY
SPRINGHILL LAND COMPANY, INCORPORATED
UNITED GAS PIPE LINE COMPANY
HOUSTON GULF GAS COMPANY
UNITED OIL PIPE LINE COMPANY
* Electric Bond and Share Company has a direct voting interest of 7.3%
** Lehigh Valley Transit Company has a direct voting interest of 0.5%
Holding Company or Utility Subsidiary Company
Non-Utility Subsidiary Company
ELECTRIC BOND AND SHARE COMPANY
CORPORATE CHART SHOWING PERCENTAGES OF VOTING POWER

EXHIBIT A



AMERICAN & FOREIGN POWER COMPANY INC.
NATIONAL POWER & LIGHT COMPANY
NEW ORLEANS PUBLIC SERVICE INC.
NORTHERN TEXAS COMPANY
UNITED GAS CORPORATION
COMPANIA MEXICANA DE GAS, S. A.
CREDITO INDUSTRIAL DE MONTERREY, S. A.
DUVAL TEXAS SULPHUR COMPANY
HOUSTON GAS SECURITIES COMPANY
UNION PRODUCING COMPANY
SPRINGHILL LAND COMPANY, INCORPORATED
UNITED GAS PIPE LINE COMPANY
HOUSTON GULF GAS COMPANY
UNITED OIL PIPE LINE COMPANY
CAROLINA POWER & LIGHT COMPANY
CAPITAN CORPORATION
EASTON TRANSIT COMPANY
EASTON AND SOUTH BETHLEHEM TRANSPORTATION COMPANY
THE EDISON ILLUMINATING COMPANY OF EASTON
HOUSTON LIGHTING & POWER COMPANY
LEHIGH VALLEY TRANSIT COMPANY
ALLENTOWN BRIDGE COMPANY
LEHIGH VALLEY REALTY COMPANY
LEHIGH VALLEY TRANSPORTATION COMPANY
HUNTINGTON TRANSIT COMPANY
MEMPHIS GENERATING COMPANY
PENNSYLVANIA POWER & LIGHT COMPANY
HALL TOWNSHIP WATER COMPANY
HERMINIE WATER SUPPLY COMPANY
NORTH BRANCH DEVELOPMENT COMPANY
PENNSYLVANIA REALTY & INVESTMENT COMPANY
WEST PITTSTON-MEHOOPANY RAILROAD COMPANY
SUSQUEHANNA GAS COMPANY
SOUTH TEXAS UTILITIES COMPANY
VALLEY RAILWAYS
WEST TENNESSEE GAS COMPANY
WHITESVILLE WATER SUPPLY COMPANY

whether it is necessary to discontinue the existence of, or modify the corporate structure of, or redistribute the voting power among security holders of, said Electric Bond and Share Company or any of the other respondents herein; (3) what further action, if any, is necessary and shall be required to be taken by the respondents herein, or any of them, in order that each of the respondents herein which is a registered holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company, and (4) what further action, if any, is necessary and shall be required to be taken by the respondents herein, or any of them, to ensure that the corporate structure or continued existence of any of the respondents herein does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of the holding company system of Electric Bond and Share Company."

The allegations of said Parts I to IX comprise forty-eight separate paragraphs containing factual allegations as to the corporate structure of the respondents, their intercorporate relationships and fragmentary allegations with respect to the financial position of the Respondents and their subsidiaries, as well as allegations that

"The structure of the holding company system of said Electric Bond and Share Company is unduly and unnecessarily complicated." (Par. 46)

"Voting power is unfairly and inequitably distributed among security holders of the holding company system of said Electric Bond and Share Company." (Par. 47)

"Said Electric Bond and Share Company is a holding company with respect to certain subsidiary com-

panies, which themselves have subsidiary companies which are holding companies." (Par. 48)

It is obvious from the nature of the proceeding and from the allegations above quoted that the matters to be dealt with at the hearing are of vital import to the respondents and their subsidiaries, as well as to the hundreds of thousands of investors in securities of companies in the Electric Bond and Share Company system and the millions of consumers presently receiving necessary public utility service from the operating companies in said system. In the circumstances, respondents believe, first, that they should be given adequate time not only to check and verify the numerous factual allegations contained in the order, but also to develop and correlate for presentation all other facts having a bearing upon the problems and issues presented by the notice and order; and second, that the problems and issues raised by the content of the notice and order, and especially the allegations of paragraphs 46 to 48, inclusive, above quoted, should be approached in proper sequence with respect to other and related proceedings now pending before the Commission, and involving the relationships of respondents and the property of and operations within the Electric Bond and Share Company system. It is with these factors in mind that this application is made by respondents.

(2) The notice and order, although dated May 9, 1940 was not received by respondents until Saturday, May 11, 1940, on which date respondents' offices were closed as respondents operate on a five day week. Consequently, the first opportunity for respondents and their counsel to consider the content of said notice and order was May 13, 1940, or only nineteen regular working days before the date fixed for hearing. Starting Monday, May 13, respondents and their counsel, with a staff augmented for the purpose, have been diligently engaged in preparation for the hearing. It

is evident from the progress made to date that neither respondents nor their counsel can be adequately prepared for a hearing on June 10, or for a period of several weeks thereafter, even with the utmost of diligence. Respondents point out that the matters involved in the notice and order require the assembling and correlating of a vast amount of historical information dealing with the corporate structure of respondents, predecessor corporations and subsidiaries, as well as an extensive examination of the laws pursuant to which their securities were issued and are outstanding. In this connection it should be borne in mind that the existence of the Electric Bond and Share Company system extends backwards for over thirty-five years, and consequently much information relevant to any proceeding dealing with its structure is not readily available. Respondents also point out that a considerable portion of their respective staffs and of the time of their counsel is engaged in preparation for hearing on the problems and issues raised by the notice and order dated February 28, 1940, pursuant to Section 11 (b) (1) of the Public Utility Holding Company Act of 1935 (File No. 59-3).

(3) The problem of collecting and correlating information and preparing for a hearing is now complicated in a manner and to an extent not heretofore contemplated by the urgent demands on the staffs of respondents and their subsidiaries in connection with expected problems concerning the national defense and in making sure that their companies are prepared for all foreseeable eventualities which may locally arise in regard thereto. A number of executives and others who will be required as witnesses in connection with this proceeding, or whose time, in part at least, is required in the preparation for hearing are specially qualified to give attention now to the studies and other work which utilities are doing, and should continue to do, in connection with local preparations for the national defense. It is not

in the public interest, or in the interest of the companies, consumers or security holders of the Electric Bond and Share Company system, that this work should in any way be hampered or delayed, as may be the case if respondents are required to prepare for and participate in an early hearing in this proceeding.

(4) In addition to the foregoing considerations, paragraph 40 of the notice and order states that there are approximately 112 subsidiary companies of American & Foreign Power Company Inc., of which 81 are public utility companies in 13 named foreign countries. In so far as the system of American & Foreign Power Company, Inc., may be involved in this proceeding, the difficulties of assembling and correlating necessary information for the hearing is greatly increased, especially under present world conditions which have already seriously affected the foreign operation and drastically disturbed the foreign exchange situation.

(5) Respondents call attention to the fact that although from two and one-half to three months have elapsed since the issuance by the Commission of its "show cause" orders to the major holding company systems pursuant to Section 11(b)(1) of the Public Utility Holding Company Act of 1935, as yet no hearings have been held aside from hearings dealing with special or clarifying points, and no further hearings with respect to such proceedings are scheduled to be held prior to June 10, 1940. By comparison the time allowed respondents in these proceedings is far too short.

(6) As stated by these respondents in the applications and answer to which they were parties, and which were filed in the integration proceedings (File No. 59-3), they consider the determination of the application of American Gas and Electric Company for an order declaring it not to be a subsidiary of Electric Bond and Share Company of primary importance in determining the problems and issues raised by Section 11(b)(1) of the Public Utility Holding Company

Act of 1935. The same considerations are applicable to these proceedings, and respondents point out that a hearing on said application of American Gas and Electric Company has been fixed for June 12, 1940, and will be presumably disposed of by the Commission within the near future. Respondents therefore take the position that orderly procedure would dictate that hearings in the present proceedings should not be commenced until such disposition.

(7) Respondents contend that an orderly approach to the solution of the problems presented by Section 11(b) of the Public Utility Holding Company Act of 1935 would further dictate that the integration problems raised by Section 11(b)(1) be disposed of prior to consideration of the problems raised by Section 11 (b) (2), since it is difficult, if not impossible, to perceive how the problems of corporate structure and voting power can be practicably or profitably examined and considered until the problems of integration raised by Section 11(b)(1) have been examined, considered and determined including the determination of how many, and what, "integrated public utility systems" may continue to be controlled by Electric Bond and Share Company and the other respondent holding companies. The determination of what corporations shall continue to exist, what the corporate structure may be, and how voting power should be distributed (assuming, without conceding, the constitutionality of Sections 11(b)(1) and 11(b)(2) of the Act), must of necessity be dependent upon the prior determination of such underlying problems. Any other procedure would be contrary to the plain intent of the Act, as evidenced not only by its objectives and structure, but also by the sequence of Sections 11(b)(1) and 11(b)(2).

(8) In making this application, respondents expressly reserve and refuse to waive any constitutional or legal rights, and expressly reserve the right to contest the constitutionality of any provision of the Act as applied to them, or of

any rule, regulation or order now or hereafter made or purported to be made thereunder, and this application is made in reliance on Rule 4, as amended, of the Rules and Regulations of the Commission issued pursuant to Section 20 of the Act. Moreover, respondents at this time expressly allege that many of the provisions of the Act, including specifically Sections 11 and 18 thereof, are unconstitutional and void and confer no right upon the Commission and impose no duty upon the respondents for the reasons, among others, that same (a) are not a regulation of commerce, (b) their enforcement will constitute deprivation of property without due process of law, and (c) constitute an unlawful delegation of legislative authority.

Wherefore the respondents, for the reasons aforesaid, respectfully make application to the Commission for an order either (1) withdrawing the notice and order or (2) postponing the hearing to a date to be fixed after the final determination of the issues raised by said application filed by American Gas and Electric Company pursuant to Section 2(a)(8) of the Public Utility Holding Company Act of 1935, and after determination of the proceedings brought pursuant to Section 11(b)(1) of said Act (File No. 59-3) and/or grant such other and further relief in the premises as may be just and proper.

Dated, New York, N.Y., May 29, 1940.

SIMPSON THACHER & BARTLETT,
by JOHN F. MACLANE,
A member of said firm.
Office and Post Office Address,
No. 120 Broadway, New York, N.Y.

REID & PRIEST,
by FRANK A. REID,
A member of said firm.
Office and Post Office Address,
No. Two Rector Street, New York, N.Y.
Attorneys for Respondents.

[Document No. 5.]

Mailed for service June 8, 1940

Securities and Exchange Commission

Washington

Reg. No. Docket Unit 977649-977653

In the Matter of

Electric Bond and Share Company,
American Power & Light Company,
Pacific Power & Light Company,
Electric Power & Light Corporation,
Utah Power & Light Company,
National Power & Light Company,
American & Foreign Power Company, Inc.,
Ebasco Services Incorporated,
Respondents.

File No. 59-12.

MEMORANDUM OPINION.

This proceeding was instituted under Section 11(b)(2) of the Public Utility Holding Company Act of 1935 by notice and order dated May 9, 1940. Respondents have filed an application requesting withdrawal of the notice and order or postponement of the hearing to a date to be fixed after final determination of the pending application of American Gas and Electric Company to be declared not a subsidiary of Electric Bond and Share Company, and after determination of the proceedings under Section 11(b)(1) (File No. 59-3). This application also urges that for various reasons the time elapsing between the issuance of the notice and order and the date of hearing is inadequate. We have examined the various reasons advanced in the application and are unable to find adequate ground for the requested delay. The date of hearing will be postponed for one week to June 17, 1940, and the hearing will be confined initially to the sole issue of whether it is necessary to discontinue

the existence of American Power & Light Company, Electric Power & Light Corporation, National Power & Light Company, and American & Foreign Power Company, Inc., or any of them, in order to ensure that the structure of the holding company system of Electric Bond and Share Company shall not be unduly or unnecessarily complicated and that voting power shall not be unfairly or inequitably distributed among the security holders in that system. Jurisdiction will be reserved with respect to all other issues described in the notice of and order for hearing.

An appropriate order will issue.

By the Commission, Commissioner Henderson being absent and not participating herein.

FRANCIS P. BRASSOR, *Secretary.*

UNITED STATES OF AMERICA
BEFORE THE SECURITIES AND EXCHANGE COMMISSION.

At a regular session of the Securities and Exchange Commission held at its office in the City of Washington, D. C., on the seventh day of June, A. D., 1940.

In the Matter of

ELECTRIC BOND AND SHARE COMPANY,
AMERICAN POWER & LIGHT COMPANY,
PACIFIC POWER & LIGHT COMPANY,
ELECTRIC POWER & LIGHT CORPORATION,
UTAH POWER & LIGHT COMPANY,
NATIONAL POWER & LIGHT COMPANY,
AMERICAN & FOREIGN POWER COMPANY, INC.,
EBASCO SERVICES INCORPORATED,
Respondents.

File No. 59-12.

ORDER.

The Commission having issued its notice of and order for hearing in the within matter pursuant to Section 11 (b) (2)

of the Public Utility Holding Company Act of 1935; said notice of and order for hearing having specified the tenth day of June 1940 as the date of hearing; respondents having filed on the thirty-first day of May 1940 their "Application with Respect to Notice of and Order for Hearing pursuant to Section 11(b)(2) of the Public Utility Holding Company Act of 1935"; and the Commission having duly considered said application and having filed its memorandum opinion in connection therewith:

It is ordered (1) that the date of hearing be, and the same hereby is, postponed for one week until the seventeenth day of June 1940; (2) that such hearing shall be limited initially to the issue of whether it is necessary to discontinue the existence of American Power & Light Company, Electric Power & Light Corporation, National Power & Light Company, and American & Foreign Power Company, Inc., or any of them, in order to insure that the structure of the holding company system of Electric Bond and Share Company shall not be unduly or unnecessarily complicated and that voting power shall not be unfairly or inequitably distributed among security holders of such system; jurisdiction being reserved to consider and dispose of all other issues presented by the notice of and order for hearing herein in appropriate manner; and (3) that in all other respects the said application filed by respondents be, and the same hereby is, denied.

By the Commission.

FRANCIS P. BRASSOR, *Secretary.*

[7]

TRANSCRIPT OF TESTIMONY.

BEFORE THE SECURITIES AND EXCHANGE COMMISSION.

File No. 59-12

In the Matter of

ELECTRIC BOND AND SHARE COMPANY ET AL.

Hearing pursuant to Section 11(b)(2) of the Public Utility Holding Company Act of 1935.

Hearing Room 1103,
Securities and Exchange Commission Building,
Washington, D. C.—Tuesday, June 18, 1940.

Met pursuant to adjournment, at 10 o'clock A.M.

Before: JAMES G. EWELL, Examiner.

Appearances:

MILTON H. COHEN, Esquire, and
ALFRED BERMAN, Esquire,
Counsel for the Commission.

JOHN F. MACLANE, Esquire, of Simpson, Thacher & Bartlett, 120 Broadway, New York City and
FRANK A. REID, Esquire, of Reid & Priest, 2 Rector Street, New York City.
Counsel for the Applicant.

[8]

Proceedings.

The Examiner: The hearing will come to order, please. I will reopen the hearing at this time in the matter of Electric Bond and Share Company, American Power & Light Company, Pacific Power & Light Company, Electric Power

NOTE: Figures in italics enclosed in brackets are the page numbers of original record.

& Light Corporation, Utah Power & Light Company, National Power & Light Company, American and Foreign Power Company, and Ebasco Services, Inc. This hearing is in pursuance of Section 11(b)(2) of the Public Utility Holding Company Act of 1935 and was originally set for June 10th, and thereafter postponed by order of the Commission to June 17 at which time the hearing was opened as scheduled at 10 A.M. and remained in session until 10:45 A.M., at which time it was continued at the request of the respondents on motion of counsel for the Commission made in their behalf. Are the parties ready to proceed at this time?

Mr. Berman: We are, Mr. Examiner.

The Examiner: May we have the appearances noted, please?

Mr. Berman: Milton H. Cohen and Alfred Berman for the Securities and Exchange Commission.

The Examiner: And for the respondents?

Mr. MacLane: Messrs. John F. MacLane and Frank A. Reid, represent their respective law firms of Simpson, [9] Thacher & Bartlett, and Reid & Priest.

In entering our appearances I believe it has been customary here, although I am not positive, to make the general reservations of constitutional and legal rights prescribed by Rule 11-4 of the Commission, which reservations are fully set forth in the answer filed by these respondents on June 15, 1940. I assume, Mr. Cohen, that that answer is part of the record in this case?

Mr. Cohen: It is not a part of the record but can be introduced on your behalf.

The Examiner: Are you referring to Rule 4 of the Rules of Practice?

Mr. MacLane: It is Rule 4 of the Rules and Regulations of the Securities and Exchange Commission promulgated pursuant to Section 20 of the Public Utility Holding Com-

pany Act, and it is stated in our answer. Then, I understand, Mr. Cohen, from your statement, that the answer of these respondents signed by Simpson, Thacher & Bartlett by myself, and Reid & Priest by Mr. Reid, which was tendered to you or filed with the Commission on June 5, 1940, in this case, File No. 59-12, may now be deemed as regularly filed and as a part of the record in this proceeding?

Mr. Cohen: Off the record.

[*10*] [Discussion off the record.]

Mr. MacLane: At what the Commission deems the appropriate time, I presume this answer may be filed as part of our case and in the statement now made of the appearances we reserve the reservations stated in that answer.

The Examiner: May I ask you to state a little more specifically for whom you appear? There are a large number of parties who were given notice in this proceeding although I believe the Commission's order of June 7th has made some limitation as to the scope of this particular hearing.

Mr. MacLane: We appear here for all the respondents named in the original notice and order, to wit, the Electric Bond and Share Company, American Power & Light Company, Pacific Power & Light Company, Electric Power & Light Corporation, Utah Power & Light Company, National Power & Light Company, American and Foreign Power, Inc. and Ebasco Services, Inc. Now, I am familiar with the order of limitation and I understand that these proceedings will be confined to the companies specified in that order. However, we had drafted our answer before that order of limitation, and the notice and order still remains as the formal document initiating this proceeding, and [*11*] it seemed to us appropriate to enter our appearance for all these companies so as to conform with our answer and the original notice and order, even though our appearance on behalf of some of them may not be directly involved at this stage in the proceeding. I assume, from what I have heard,

that an order of dismissal of the American and Foreign has been made, and when formally notified of that I shall withdraw my appearance for the American and Foreign Power.

Mr. Berman: That will be done.

The Examiner: Is the Commission ready to proceed?

Mr. Berman: It is. May I say, Mr. Examiner, that this is a hearing with respect to Electric Bond and Share and certain other respondents named in the Commission's order under Section 11(b)(2) of the Public Utility Holding Company Act of 1935. The Commission in its original order and notice of hearing stated that: It appearing to the Commission, and it having reasonable grounds to believe that the structure of the holding company system of Electric Bond and Share Company is unduly and unnecessarily complicated, the voting power is unfairly and inequitably distributed among security holders of the holding company system of such Electric Bond and Share Company, and that said Electric Bond and Share Company is a holding company with respect [*12*] to certain subsidiary companies which themselves have subsidiary companies which are holding companies, ordered this hearing in which the respondents named above were made respondents herein for the purpose of determining:

(1) Whether the allegations of Parts 1 to 9 of the Commission's notice of and order for hearing are true and accurate;

(2) Whether it is necessary to discontinue the existence or modify the corporate structure of or redistribute the voting power among securities holders of said Electric Bond and Share Company, or any of the other respondents herein; and

(3) What further action, if any, is necessary and shall be required to be taken by the respondents herein, or any of them, in order that each of the respondents herein which is

a registered holding company, shall cease to be a holding company with respect to each of its subsidiary companies, which itself has a holding company which is a holding company; and

(4) What further action, if any, is necessary and shall be required to be taken by the respondents herein or any of them, to insure that the corporate structure or continued existence of any of the respondents herein does not unduly or unnecessarily complicate the structure or unfairly or inequitably distribute voting power among [*13*] security holders of the holding company system of Electric Bond and Share Company.

Further in its notice of hearing the Commission said that:

> "Any person proposing to intervene in said proceedings shall file with the Secretary of the Securities and Exchange Commission on or before the third day of June, 1940, his request or application therefor, as provided by Rule 17 of the Rules of Practice of said Securities and Exchange Commission."

I now ask you, Mr. Examiner, if you will inquire whether there are any members of the public present or any interested persons or members of state commissions, or any other persons wishing to enter an appearance or be heard in this proceeding.

The Examiner: I so inquire. The record will show there is no response. The record will further show that I made a similar inquiry during the opening session yesterday, and no request was made. The record will further show that I request the hearing room clerk to refer any inquiries by any persons during the course of the day by any persons, directly to myself, and this morning I was informed by the hearing room clerk that no inquiries were made except by two [*14*] people who represented themselves as spectators and who did not give their names and who were notified by

the said hearing room clerk that the hearing was resumed this morning at 10 o'clock.

Mr. Berman: I wish to state for the record, Mr. Examiner, I wish to ask counsel for the respondents to join with me in the following stipulation if they see fit: That all documents offered as exhibits are offered subject to the following conditions: (a) Documents which are a part of the original files of the Commission shall not be attached to nor be copied into the transcript of the record; (b) In the event that copies of such documents are required for any Court review or proceeding, certified or photostatic copies of such documents may be supplied in lieu of the originals. Will counsel so stipulate?

Mr. MacLane: Yes, sir. May I ask a question in connection with (b)? These documents, I assume, some of them at least, may be very voluminous and only relatively small parts may be relevant. Is it your thought that the entire document be photostated regardless of the relevance or irrelevance of a large part of this?

Mr. Berman: That is a point we are very pleased to [15] take up and we will be glad to stipulate that in the event of any court review or any other proceeding in connection with the present proceeding, that only such parts of the documents put into evidence as to which we are making this stipulation, need be printed as are agreed by the parties to be material. Is that satisfactory to you?

Mr. MacLane: I don't want to be ultra-technical, but the parties may differ as to what parts are material, and I assume you would want to be at liberty to put into the record all parts which you deemed material and, we might wish to put in some parts which you did not deem material.

The Examiner: Might not the Examiner assist in such case?

Mr. Berman: Would it be satisfactory to you if the decision were made by the Examiner?

Mr. MacLane: I think so, generally speaking. It is rather difficult to visualize the condition which might arise.

The Examiner: I might say that that decision will be made by the Examiner.

Mr. MacLane: It has been suggested that perhaps the appropriate stipulation might be that there should be put in such portion which either party deemed to be relevant and [16] necessary to an adequate court review. For example, if this were a proceeding in a lower court, and we offered a document in evidence which was objected to and the objection was sustained, we would nevertheless have the right to have included within the record that part of the document, or that document which has been so objected to, so that the reviewing court could determine whether it was material, and whether it should be considered or not.

The Examiner: I would say that is entirely proper and I would allow that as an offer of proof.

Mr. MacLane: I don't think we are going to have any practical difficulty when we get to it, Mr. Examiner, but I want to be sure about what I am stipulating.

The Examiner: There will be no question about that. On the other hand, the question as to whether or not it will be admitted at this stage of the proceeding rests in my discretion.

Mr. MacLane: I understand that.

Mr. Berman: I offer in evidence, Mr. Examiner, as Commission's Exhibit 1, notice of and order for hearing entered May 9, 1940, in the matter of Electric Bond and Share Company, American Power & Light Company, Pacific Power & Light Company, Electric Power & Light Corporation, Utah Power & Light Company, National Power & Light Company, [17] American and Foreign Power Company, Inc., Ebasco Services, Inc., fixing a hearing before the Commission for the tenth day of June, 1940.

Mr. MacLane: No objection.

The Examiner: Received without objection.

[The document referred to was thereupon received in evidence as Commission's Exhibit 1.]

Mr. Berman: It is to be noted that page 18 of the notice of and order for hearing states: "That notice is particularly given to each of the named respondents and to all other persons including the security holders and consumers of the said respondents, the subsidiary companies of the said respondents, all states, municipalities and political subdivisions of states within which are confined any of the utility assets owned and operated by the Electric Bond and Share Holding company system, or under the laws of which any of the respondents or their subsidiary companies are incorporated, all state commissions, state securities commissions and all agencies, authorities or instrumentalities of one or more states, municipalities or other political subdivisions having jurisdiction over any of the respondents or their subsidiary companies or over any of the businesses, affairs or operations of any of them." In this connection, Mr. Examiner, I wish to state [*18*] that on May 24, 1940, the Commission issued an order granting the request of the Wisconsin Public Service Commission to intervene in the present proceeding, and on June 17, 1940, the State of Maine filed a request for permission to intervene, as to which because of the recentness of the filing, the Commission has not yet taken definite action.

The Examiner: Have any other requests been made or have any other communications or communications from other persons claiming to be interested, been received by the Commission expressing a desire to be heard in connection with this matter?

Mr. Berman: We have received from time to time several communications, I believe, Mr. Examiner, none of which have been construed as formal requests to intervene or even to be heard. There was a letter from the Railroad Commis-

sion of Texas, I believe, raising some questions with respect to how the proceeding would affect certain utilities in their state, and upon reply we heard no further from that body. A letter was received from a gentleman by the name of Barksdale, I believe, who described himself as a security holder of Electric Bond and Share, asking whether he could be heard or could intervene. [*19*] We replied forwarding the rules of the Commission and asking him to advise us whether he wished to be heard or wished to intervene formally, and up to this time we have not yet received a reply from Mr. Barksdale. Should we receive such a reply we will communicate it to you at once.

The Examiner: How long ago was that?

Mr. Berman: Our reply was sent fully a week ago, perhaps more than a week ago.

The Examiner: Where does he reside?

Mr. Berman: In Virginia.

The Examiner: It is now 10:30. I ask at this time again if any person is present in the room wishing to be heard in connection with this matter. The record will show there is no response.

Mr. Berman: I offer in evidence a sheet of paper bearing a number of post office return receipts for registered mail, duly signed, acknowledging the receipt by each of the respondents and their counsel, of copies of the notice of and order for hearing in this proceeding.

Mr. MacLane: No objection. If it will be any accommodation we will be glad to admit it without an offer of the exhibit.

The Examiner: There is no question as to the sufficiency of notices regarding these proceedings on [*20*] behalf of any of the respondents named in the order?

Mr. MacLane: No, sir.

The Examiner: Do you withdraw those Mr. Berman?

Mr. Berman: I offered them and they were marked.

The Examiner: Admitted without objection.

[The document referred to was thereupon received in evidence as Commission's Exhibit 2.]

Mr. Berman: I wish to offer in evidence a copy of the original press release, Holding Company Act Release No. 2051, released to the press by the Commission's press room prior to May 10, 1940, giving public notice of the hearing in this matter originally set for June 10. In addition, copies of this release were sent to all those on the Commission mailing list of newspapers, numbering approximately 200, the Commission's list of regulatory authorities numbering approximately 200, and the Commission's general mailing list numbering approximately 4,200.

Mr. MacLane: This is offered, I assume, simply to show that it gave publicity to the fact of the hearing?

Mr. Berman: That is so, not as factual proof of anything except that said notice was given.

Mr. MacLane: No objection on that ground.

The Examiner: Received in evidence.

[21] [The document referred to was thereupon received in evidence as Commission's Exhibit 3.]

The Examiner: This being a public hearing I think the record ought to show that at the time the Examiner inquired regarding appearances by the public, there were approximately 20 people present in the room in addition to counsel.

Mr. Berman: I wish to offer in evidence documents indicating that copies of the order of and notice for hearing were mailed to the mayors of approximately 100 communities located in 21 states in which the respondents or their subsidiaries conduct all or part of their operations.

Mr. MacLane: No objection.

The Examiner: Admitted.

[The document referred to was thereupon received in evidence as Commission's Exhibit 4.]

Mr. Berman: I wish to state for the record that a copy of the notice of and order for hearing as scheduled for June 10th, was published in the Federal Register of May 7, 1940, Volume 5, No. 93, page 1685, Federal Register Docket No. 40-2310.

The Examiner: Was the order of June 7th postponing the hearing also published in the Federal Register?

Mr. Berman: Yes, sir. I wish to offer in evidence the order of the [22] Commission dated June 7, 1940, postponing the hearing scheduled for June 10th until June 17, 1940, and ordering that such hearing shall be limited initially to the issue of whether it is necessary to discontinue the existence of American Power & Light Company, Electric Power & Light Corporation, National Power & Light Company and American and Foreign Power Company, Incorporated, or any of them, in order to insure that the structure of the holding company system of Electric Bond and Share Company shall not be unduly or unnecessarily complicated, and that voting power shall not be unfairly or inequitably distributed among securities holders of such system, jurisdiction being reserved by the Commission to consider and dispose of all other issues presented by the notice of and order for hearing herein in an appropriate manner.

Mr. MacLane: No objection.

The Examiner: Admitted without objection.

[The document referred to was thereupon received in evidence as Commission's Exhibit 5.]

Mr. Berman: I wish to offer in evidence copies of post office return receipts for registered mail, duly signed, acknowledging the receipt by counsel for the respondents and by the Public Service Commission of the State of Wisconsin and by the State of Maine, of the Commission's order of June 7th postponing the hearing [23] until June 17 and confining the issue as stated.

Mr. MacLane: No objection.

The Examiner: Admitted.

[The document referred to was thereupon received in evidence as Commission's Exhibit No. 6.]

Mr. Berman: I offer in evidence copy of Holding Company Act Release No. 2099, released to the press prior to June 10, 1940, announcing that an order had been issued postponing the hearing from June 10th to June 17, and that the hearing would be confined to the issues as stated in the order. Copies of this release were distributed to the persons on the various mailing lists of the Commission recited above. A copy of it was published in the Federal Register on June 11, 1940, Volume 5, No. 113, page 2188, Federal Register Document No. 40-2310

Mr. MacLane: No objection.

The Examiner: The release is admitted without objection.

[The document referred to was thereupon received in evidence as Commission's Exhibit 7.]

Mr. Berman: I wish to offer in evidence copy of the Commission's order dated June 11, 1940, designating James G. Ewell as the officer to preside at the hearing in the present proceeding.

[24] Mr. MacLane: No objection.

The Examiner: Admitted.

[The document referred to was thereupon received in evidence as Commission's Exhibit 8.]

Mr. Berman: I offer in evidence copies of post office return receipts duly signed, attesting receipt by counsel for the respondents of the order designating James G. Ewell as the officer to preside at the hearing.

Mr. MacLane: No objection.

The Examiner: Admitted.

[The document referred to was thereupon received in evidence as Commission's Exhibit 9.]

Mr. Berman: I wish to state that a copy of said order designating the Examiner was published in the Federal

Register on June 13, 1940, Volume 5, No. 115, page 2219, Federal Register Document Number 40-2381.

Mr. Berman: I offer in evidence copy of the order of the Commission dated June 17, in which it is ordered that American and Foreign Power Company, Inc. be dismissed as a party to this proceeding without prejudice to any future appropriate proceedings involving said American and Foreign Power Company, Inc. under Section 11(b)(2) or any other section of the Public Utility Holding Company Act of 1935, and without limitation upon the power of the Commission to issue any appropriate order directed to the [25] remaining respondents in this proceeding.

Mr. MacLane: No objection.

The Examiner: Admitted.

[The document referred to was thereupon received in evidence as Commission's Exhibit 10.]

Mr. MacLane: Mr. Examiner, I don't know that this is the appropriate time, but I will give notice now that in view of this order represented by Exhibit No. 10, the appearance of counsel for American and Foreign Power will be withdrawn as to American and Foreign Power.

The Examiner: In that connection, it occurs to me that certain testimony here may be adduced effecting the rights of various other companies and if they should be affiliated with this group of particular respondents here, does your appearance cover that situation?

Mr. MacLane: Since the American and Foreign is out of the proceeding, I assume it is not proper for them to be represented by counsel.

The Examiner: I am speaking of the remaining respondents.

Mr. MacLane: I really have not considered that. I don't believe I am prepared to answer you at the moment. I suppose your question is really directed to the point as to

whether if the testimony is adduced to the effect that certain relationships between one of these [26] named holding companies and one of its domestic subsidiaries from which a conclusion might be drawn that those relationships might or might not be effected, the question you pose is whether an order might be made without someone coming in to represent that particular respondent.

The Examiner: I think the order may be made if due process has been had in the matter of notice. I am simply drawing the matter to your attention so that you can procure any further representation you think is necessary.

Mr. MacLane: I think I should wait until the contingency arises because I can't visualize it exactly at the moment.

Mr. Berman: May I proceed, Mr. Examiner?

The Examiner: Yes.

Mr. Berman: I ask that there be marked for identification with Exhibit numbers, the following documents:

The U5B statement filed by Electric Bond and Share Company, consisting of one volume bearing Commission's Docket No. 30-139-1. That would bear the identification of Exhibit 11.

Mr. MacLane: What is the date of the filing?

Mr. Berman: April 4, 1938 is the day it was received in our files.

[The document referred to was thereupon marked for identification as Commission's Exhibit 11.]

[27] Mr. Berman: Similarly I ask to have marked for identification as Commission's Exhibit 12, the U5S statement of Electric Bond and Share Company for 1938 consisting of one volume, bearing Commission's Docket No. 30-139-2, and stamped as received in the Commission's files on May 1, 1939.

The Examiner: It may be so marked.

[The document referred to was marked for identification as Commission's Exhibit 12.]

Mr. Berman: I ask that there be marked as Exhibit 13, the U5S statement of the Electric Bond and Share Company for the year 1939, consisting of one volume, bearing Commission's Docket No. 30-139-2, and marked as received in the files of the Commission on June 4, 1940.

The Examiner: It may be so marked.

[The document referred to was marked for identification as Commission's Exhibit 13.]

Mr. Berman: I ask that there be marked as Commission's Exhibit 14 the U14-3 statement of Electric Bond and Share Company, consisting of one volume, bearing Commission's Docket No. 48-109-1.

The Examiner: It may be so marked.

[The document referred to was marked for identification as Commission's Exhibit 14.]

Mr. Berman: This contains information apparently [28] for the year 1938 and 1939. I ask that there be marked as Commission's Exhibit 15 a file containing proxy information filed by Electric Bond and Share Company in connection with the meetings of stockholders of said company, consisting of one file bearing the Commission's Docket No. 53-155-1. This covers several years, I think.

The Examiner: It may be so marked.

[The document referred to was marked for identification as Commission's Exhibit 15.]

Mr. Berman: Mr. Examiner, I would like to state that counsel for the Commission offer these documents and the similar documents which will be offered in connection with the other respondents for the limited purpose of making them available as part of the record in these proceedings to all parties, for the purpose of convenient reference and for such consideration as may be appropriate. In offering these exhibits, counsel for the Commission does not vouch for the accuracy of any statement contained therein, and vouches merely for the fact that the documents

are part of the official files of the Commission. In offering these exhibits, counsel for the Commission does not concede the materiality or relevancy of any of the material therein contained, and reserves the right to object to consideration of particular material herein [*29*] contained with respect to the issues in this proceeding, and similarly wishes to make clear that any party to the proceeding may at an appropriate time object to the materiality or relevance of any particular provisions thereof. In connection with this offer I wish to point out that in the registration statement filed by Electric Bond and Share Company, marked Exhibit 11, the following information among other information is furnished.

Item 4 sets forth a list of companies in the system showing type of organization, state of organization and type of business.

Item 5 contains a brief description of the general character of the business of the company and its wholly owned subsidiaries, and the substantial changes that have occurred in the general character of the business within the preceding five years. It is to be noted that the U5B statement of Electric Bond and Share Company generally contains information only as to the company itself and its several wholly owned subsidiaries. Information pertaining to American Power & Light Company and its subsidiaries, Electric Power & Light Corporation and its subsidiaries and National Power & Light Company and its subsidiaries may be found in the [*30*] respective U5B statements of these respective subholding companies.

Now, Item 8a of the U5B statement of Electric Power & Light Company shows the funded debt outstanding of the company's wholly owned subsidiaries and the funded debt of those other subsidiaries in which the company owns a portion of the funded debt.

Item 8b contains comparable data for the capital stock as that shown for the funded debt in Item 8a above.

Item 9 sets forth the investments of the company and its wholly owned subsidiaries.

Item 10 shows the investments of the company in securities of American and Foreign Power Company, Inc., American Gas & Electric Company and in securities of other companies which are claimed to be or which are not part of the Electric Bond and Share System.

Item 11a shows debts by associates to the company and wholly owned subsidiaries where the debt exceeds $50,000 or an amount greater than 1/2 or 1 per cent of total debit accounts in the balance sheet of the debtor.

Item 12 describes the principal features of several leases involving No. 2 Rector Street Corporation, and Item 15 sets forth a list of the 20 largest stockholders of each class of stock of Electric Bond and Share Company.

Item 16a shows the compensation that the annual rate [31] as of June 30, 1938 of each director and officer of the company and its wholly owned subsidiaries, where the aggregate compensation is $1,000 per annum or more.

Item 16b shows the compensation of regular employees who are not officers or directors of the company and its wholly owned subsidiaries, and whose annual regular rate of compensation is $20,000 per year or more. Exhibit A of this U5B form is a corporate chart showing the percentage of voting securities held by the company in its subsidiaries, and also shows similar data in respect of subsidiaries of wholly owned subsidiaries of the company. Exhibit B comprises copies of charters, articles of incorporation and other fundamental documents, as well as the by-laws of the company and its wholly owned subsidiaries. Exhibit D contains the financial statements as of December 31, 1937, of the company and its wholly owned subsidiaries.

Exhibit F contains a copy of the annual report to stock-

holders of the company for the year ended December 31, 1937. Exhibit G is a report for the year ended December 31, 1937, filed by Ebasco Services, Inc. with the Public Utilities Commissioner of the State of Oregon.

Now, the U5S statement of Electric Bond and Share [32] Company which has been marked as Commission's Exhibit No. 12 and which is the annual supplement to the registration statement for the year 1938, contains information in general similar to that contained in the U5B statement, but brings up to date to the close of the calendar year 1938 such information. It also contains transcripts of surplus accounts of the company's wholly owned subsidiaries from the dates of inception to December 31, 1938. The U5S statement of Electric Bond and Share Company marked Exhibit 13, brings up to date to the close of the year 1939 information comparable to that of the previous U5B and U5S statements.

Attention is called, however, to the following additional items contained in certain exhibits.

Item 18, the provisions of this item are expanded to include a description of all service, sales and construction contracts in effect during the prior calendar year, by affiliates and by others involving a total compensation of $10,000 or more. Exhibit D of such statement has been expanded to include a transcript of open accounts payable, schedules of depreciation or retirement reserve accounts, statement of depreciation allowable or federal income taxes, and a statement as to any changes in accounting principles [33] and practice. Exhibit G has been expanded to include certain additional reports to be filed thereunder.

The proxy information contains the data filed with the Securities and Exchange Commission by Electric Bond and Share Company, with respect to proxies solicited for annual stockholders' meetings in 1938 and 1939. I now ask that these dockets and files be received subject to the

conditions stated above, in accordance with the exhibit numbers given them.

The Examiner: Is that agreeable to counsel for the respondent?

Mr. MacLane: Yes, on the reservation stated by counsel for the Commission as applicable and available to both sides.

The Examiner: They are admitted under the conditions noted.

[The documents referred to and previously marked for identification as Commission's Exhibits 11 to 15 inclusive, were received in evidence.]

Mr. Berman: At this time I ask to have marked for identification with exhibit numbers the following documents: The U5B statement of American Power & Light Company, consisting of 14 volumes, bearing Commission's Docket Nos. 30-144-1, 1 to 14 inclusive. [34] I ask that they be designated as Commission's Exhibit 16, the first volume being designated 16(a) and the others 16(b), 16(c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (n), successively.

The Examiner: Off the record.

[Discussion off the record.]

The Examiner: They may be so marked.

[The documents referred to were thereupon marked Commission's Exhibit 16(a) to 16(n) inclusive were marked for identification.]

Mr. Berman: It is agreed that these documents which have been received subject to the statement previously made, and those documents of like character which are to follow, with respect thereto counsel for the Commission and counsel for the respondents reserve, as has been said, the right to question the relevancy or materiality of any portions thereof, and that in the event of Court review or Court proceeding of any kind, if the parties are unable to agree as to which portions are material and necessary

to such proceeding, that the matter shall be referred to James G. Ewell, the Trial Examiner in the present proceeding, for determination, subject to the right of either side who feels aggrieved at the ruling of the Trial Examiner, to have printed at its own expense such portions of the documents excluded and offered to the Court in [35] connection with such proceeding. Is that agreeable?

Mr. MacLane: Yes, sir, the same to have the effect of offers of proof incorporated into the record on appeal. Now, may I ask one question? I hope I am not going to be in any stage of this proceeding technical. I want to move along as much as anybody else. But is it in contemplation of counsel for the Commission that at some time we may be definitely advised by him as to just what portion of this voluminous documentary material we have got to meet? The thing that is a little bit disturbing to me is that we have here piled up before us, 40 or 50 volumes, I suppose, which look as though they comprise several hundred, and some of them several thousands, pages. The offer of their introduction in evidence, coupled with the statement that by offering them counsel for the Commission does not accept any of them or any statement in them as proof of any fact—

The Examiner: Except as an admission against any person offering them.

Mr. MacLane: But it is not binding on him for affirmative proof or any evidence of what his contentions are, and I want to know whether we are going to have any more definite information as to what we have to meet [36] with respect to these papers.

Mr. Berman: With respect to Judge MacLane's question, Mr. Examiner, we wish to say that at the conclusion of the hearings, the time when counsel for the Commission submits to the Commission his proposed findings of fact and the brief in support of such proposed findings of fact and

conclusions, such portion of those documents upon which any proposed finding is made will be clearly and specifically identified so that counsel for the respondents will know exactly what we have relied upon, and I take it that counsel for the respondents in submitting their proposed findings and their brief, will similarly indicate what portion of the documents they base their proposal on, so that the scope of this vast field of documents will be narrowed right down to the necessary point.

Mr. MacLane: It occurs to me that is perhaps a little late. My point is directed to the question as to what we prepare our proof to meet with respect to these things. It does not seem to me you can indicate in this record all the files in the government Archives Building and expect to meet something.

Mr. Berman: We propose further to state at the conclusion of the admission of the documentary evidence that we have to introduce, what our contentions are and what we contend that these documents and the various [37] exhibits offered by the Commission will prove and do prove, and what conclusion may be drawn therefrom, so that we feel that counsel will be adequately advised of our position and will be in a position to meet the issues.

Mr. MacLane: With that understanding I have nothing more to say until that time comes. Then I will say whether I feel that I have notice or not.

The Examiner: I would like to correct my statement where I said the evidence would be binding against the person offering it. I meant the person who filed the document.

Mr. Berman: May I proceed with the offering of the documents, Mr. Examiner?

The Examiner: Certainly.

Mr. Berman: At this time I wish to have marked as Commission's Exhibit 17 the U5S statement of American

Power & Light Company for 1938, consisting of eight volumes bearing Commission's Docket Nos. 30-144-2, 1 to 8 inclusive, the first volume being designated as Commission's Exhibit 17(a) and the others (b), (c), (d), (e), (f), (g), and (h) successively. That is for 1938 and bears the stamp of the Commission's file room showing receipt on May 31, 1939.

The Examiner: They may be so marked.

[*38*] [The documents referred to were marked for identification Commission's Exhibits 17(a) to 17(h) inclusive.]

The Examiner: Off the record.

[Discussion off the record.]

[*39*] Mr. Berman: May we proceed?

The Examiner: Yes.

Mr. Berman: I ask to have marked as Commission's Exhibit 18 the U5S statement of American Power and Light Company for 1939 consisting of six volumes bearing Commission Docket No. 30-144-2-1 to 6 inclusive, and I ask that the first volume be designated as Commission's Exhibit 18-A and the others as B, C, D, E, F successively. This statement bears the stamp of the Commission Docket and Mails and Files Room showing receipt thereof as of June 1, 1940.

The Examiner: The documents so described may be marked for identification Commission's Exhibits 18-A, 18-B, 18-C, 18-D, 18-E and 18-F.

[The documents referred to were marked Commission's Exhibits Nos. 18-A to 18-F, inclusive, for identification.]

Mr. Berman: Mr. Examiner, I ask to have designated as Commission's Exhibit No. 19 the U-14-3 statement of American Power and Light Company consisting of one volume bearing Commission's Docket No. 48-107, containing information for the years 1938 and 1939.

The Examiner: The document described may be marked for identification Commission's Exhibit No. 19.

[The document referred to was marked Commission's Exhibit No. 19 for identification.]

[40] Mr. Berman: I ask to have designated as Commission's Exhibit No. 20 a file containing proxy information filed by American Power and Light Company in connection with meetings of stockholders of said company, one file bearing Commission Docket No. 53-154-1. This contains proxy information for the years 1938 and 1939.

The Examiner: The document described may be marked for identification Commission's Exhibit No. 20.

Mr. Berman: I ask to be marked as Commission's Exhibit No. 21 the form 10 statement filed by American Power and Light Company under the Securities and Exchange Act of 1934 consisting of one volume bearing Commission's Docket No. 1-2224-1, bearing on it the stamp of the mails and files room of the Commission showing receipt on April 8, 1935.

The Examiner: The document described may be marked for identification Commission's Exhibit No. 21.

[The documents above referred to were marked Commission's Exhibits Nos. 20 and 21, respectively, for identification.]

Mr. Berman: I ask to have marked as Commission's Exhibit No. 22 the Form 10-K and 8-K statement filed by American Power and Light Company under the Securities and Exchange Act of 1934 consisting of one volume bearing Commission's Docket No. 1-2224-2. It contains various [41] dates so that it can not be more specifically identified.

Mr. MacLane: Are those supplemental statements?

Mr. Berman: Yes, those are supplemental.

The Examiner: The document described may be marked for identification Commission's Exhibit No. 22.

[The document referred to was marked Commission's Exhibit No. 22 for identification.]

Mr. Berman: In connection with the documents which have been marked as Exhibits 16 to 22 inclusive, together with the letters, I should like to make the following statement as to what is to be found in these documents. The U5B registration statement of American Power and Light Company, Exhibit 16, contains in general information similar to that enumerated above in connection with the registration statement introduced for Electric Bond and Share Company and its wholly owned subsidiaries. Attention is called to the following additional items to be found in Exhibit 16:

Exhibit 5 contains data as to total communities served with electricity, natural gas and manufactured gas. Data for the five years ending December 31, 1937 with respect to the electricity generated and purchased; electric sales; electric customers; electric operating revenues; gas send out; gas sales; gas customers; gas operating revenues of the system.

[42] Item 6 briefly describes the general character and location of the principal plants and properties of the companies in the system.

Item 11-A contains data on inter-system indebtedness where the debt exceeds $50,000 or an amount greater than one-half of 1 per cent of debit accounts on the balance sheet of the debtor.

Item 11-B contains information similar to that in 11-A with respect to debts owing to others.

Item 12 describes principal features of certain leases of the system companies.

Item 13 summarizes the important sales of securities during the preceding five years.

Item 18 includes information as to service sales and construction contracts.

Item 19 describes certain classes of litigation as concerns the company.

Item B comprises copies of indentures and other fundamental documents refining rights of holders of each class of funded debt above a certain minimum size.

Exhibit D contains consolidating financial statement as of December 31, 1937 of the company and its subsidiaries.

Exhibit E contains maps of the properties of the electric and gas subsidiaries.

[*43*] Exhibit F contains annual report to stockholders of the system companies for the year ending December 31, 1937.

Exhibit G contains copies of annual reports filed with state commissions and with the Federal Power Commission for the year ended December 31, 1937.

Exhibit H contains typical forms of service contracts, inspection orders and construction contracts.

Supplement to Exhibit B contained in the last volume of Form U5B contains data of major revaluation of investments and fixed assets.

The U5S annual supplement to the registration statement of American Power and Light Company marked Exhibit 17, contains in general information comparable to that enumerated in connection with the U5B statement, but brings up to date to the close of the calendar year 1938 such information. This statement also contains transcripts of surplus account of subsidiaries from the date of the inception of the companies in the system or from January 1st, 1915, whichever is the later date.

The U5S supplement for 1939 marked as Exhibit 18 contains similar information brought up to the end of 1939.

The U14-3 statement of American Power and Light Company marked Exhibit No. 19 contains information for the period beginning June 1, 1938 ending December

31, 1938, and for the period beginning January 1, 1939 and ending [44] December 31, 1939 with respect to the following:

Item 100 a comparative balance sheet.

Item 102 investments, securities and advances.

Item 150 capital stock.

Item 152 bonded debt.

Item 190 capital surplus.

Item 200 income account.

Item 300 earned surplus account.

Item 261 dividends.

Item 202 investments in stock on which no dividends were declared during the year and accumulated unpaid dividends on preferred stocks of the subsidiary companies.

Item 203 interest.

Item 210 legal and other professional services.

Item 230 other expenses.

Item 240 taxes.

Item 315 dividend appropriations of earned surplus.

The Form 10 statement filed by American Power and Light Company under the Securities and Exchange Act of 1934 marked Exhibit 21 includes the following information among other information:

Item 10 sets forth a tabulation of subsidiaries and parents of registrant showing the respective percentages of voting power.

Item 13 sets forth the funded debt of registrant and subsidiaries.

[45] Item 14 sets forth the capital stock of the registrant.

Item 18 is a description of the registrant's funded debt.

Item 19 description of the registrant's capital stock.

Item 13 sets forth revaluation since January 1, 1925 in investments, property, plant and equipment and intangible assets; restatements since January 1, 1925 of capital stock and write-off since that date of bond discount and expense

earlier than as required under any periodic amortization plan.

In addition there are set forth financial information including a consolidating balance sheet as of December 31, 1934; a consolidated profit and loss statement for the twelve months ended December 31, 1934; a schedule of consolidated plant, property, franchises and so forth; consolidated earned surplus; a corporate balance sheet as of December 31, 1934; corporate income statement for the twelve months ended December 31, 1934; a schedule of investments in subsidiaries and earned surplus.

The Form 10-K statement marked as Exhibit 22 brings the information contained in the Form 10 statement down to date in the succeeding years and the Form 8-K included in Exhibit 22 reflects certain special transactions occurring in succeeding years.

Mr. Examiner, these dockets and filed which have been [46] marked as Commission's Exhibits 16 to 22 inclusive are offered as exhibits, subject to the same terms and conditions stated previously with respect to the similar document offered for Electric Bond and Share. I ask that they be received.

Mr. MacLane: Subject to the same understanding we had with respect to the others, yes.

The Examiner: They are admitted.

[The documents referred to were marked Commission's Exhibits Nos. 16 to 22, inclusive, and admitted in evidence.]

Mr. Berman: Mr. Examiner, at this point I ask to have marked for identification with exhibit numbers the following documents:

The U5B statement of Electric Power and Light Company consisting of 12 volumes bearing Commission's Docket No. 30-143-1-1 to 12 inclusive, and I ask that it be marked as Commission's Exhibit 23, the first volume being designated

as 23-A and the others B, C, D and so forth, successively. This docket bears the stamp of the Securities and Exchange Commission Docket, mail and files room showing receipt of the statement on April 7, 1938.

The Examiner: The 12 documents described may be marked for identification Commission's Exhibits 23-A, 23-B, 23-C, 23-D, 23-E, 23-F, 23-G, 23-H, 23-I, 23-J, 23-K, and [47] 23-L.

[The documents referred to were marked Commission's Exhibits No. 23-A to 23-L, inclusive, for identification.]

The Examiner: We will take a five-minute recess.

[Short recess.]

Mr. Berman: May I proceed, Mr. Examiner?

The Examiner: Proceed.

Mr. Berman: We ask that there be marked as Commission's Exhibit No. 24 the U5S statement of Electric Power and Light Corporation for 1938, consisting of five volumes bearing Commission's Docket Nos. 30-143-2-1 to 5 inclusive, stamped as received by the Commission's mail and file room May 1, 1939, and I ask that the first volume be designated as 24-A and the others 24-B, C, D, and E, successively.

The Examiner: The documents described may be marked for identification Commission's Exhibits Nos. 24-A, 24-B, 24-C, 24-D, and 24-E.

[The documents referred to were marked Commission's Exhibits Nos. 24-A to 24-E, inclusive, for identification.]

Mr. Berman: I ask that there be designated as Commission's Exhibit No. 25 the U5S statement of Electric Power and Light Corporation for the year 1939 consisting of six volumes bearing Commission's Docket Nos. 30143-2-1 to 6 inclusive, and I ask that the first volume be designated [48] as Exhibit 25-A and the others B, C, D, E, and F successively. This exhibit bears the stamp of the mail and file room showing receipt as of June 1, 1940.

The Examiner: The documents described may be marked for identification as Commission's Exhibits No. 25-A, 25-B, 25-C, 25-D, 25-E and 25-F.

[The documents referred to were marked Commission's Exhibits No. 25-A to 25-F, inclusive, for identification.]

Mr. Berman: I ask that the U14-3 statement of Electric Power and Light Corporation consisting of one volume bearing Commission's Docket No. 48-108-1 be marked as Commission's Exhibit No. 26. This exhibit contains information for the years 1938 and 1939.

Mr. MacLane: Are those proxy statements?

Mr. Berman: No, that is the U14-3 statement.

The Examiner: The document described may be marked for identification Commission's Exhibit No. 26.

[The document referred to was marked Commission's Exhibit No. 26 for identification.]

Mr. Berman: I ask that there be designated as Commission's Exhibit No. 27 a file containing the proxy information filed by Electric Power and Light Corporation for the years 1938 and 1939, one file bearing Commission's File No. 53-159-1.

[49] The Examiner: The document described may be marked for identification Commission's Exhibit No. 27.

[The document referred to was marked Commission's Exhibit No. 27 for identification.]

Mr. Berman: I ask that there be designated as Commission's Exhibit No. 28 the Form 10 statement filed by Electric Power and Light Corporation under the Securities and Exchange Act of 1934 comprising one volume bearing Commission's Docket No. 1-222-1, bearing the stamp of the file room showing receipt as of April 2, 1935.

The Examiner: The document described may be marked for identification Commission's Exhibit No. 28.

[The document referred to was marked Commission's Exhibit No. 28 for identification.]

Mr. Berman: I ask that there be designated as Commission's Exhibit No. 29-A and B the Form 10-K and 8-K statements filed by Electric Power and Light Corporation under the Securities and Exchange Act of 1934, being two volumes bearing the Commission's Docket No. 1-222-2-1 and 2, the first volume being designated as A and the second as B.

The Examiner: The document described may be marked for identification Commission's Exhibits Nos. 29-A and 29-B, respectively.

[50] [The documents referred to were marked Commission's Exhibits Nos. 29-A and 29-B, respectively, for identification.]

Mr. Berman: These dockets and files which have been designated Commission's Exhibits 23 to 29 inclusive contain in general the same information with respect to Electric Power and Light Corporation as was enumerated above in connection with the American Power and Light Company, Commission's Exhibits 12 to 22, inclusive. These dockets and files are offered as exhibits subject to the same terms and conditions stated previously with respect to the similar documents offered for Electric Bond and Share, and I now ask that they be received.

The Examiner: Admitted accordingly.

Mr. MacLane: Subject of course to the same understanding.

Mr. Berman: That is understood.

The Examiner: That is correct.

[The documents referred to previously marked for identification Commission's Exhibits Nos. 23 to 29, inclusive, were received in evidence.]

Mr. Berman: I ask that there be designated as Commission's Exhibit No. 30 the U5B statement of National Power and Light Company consisting of nine volumes bearing

Commission's Docket Nos. 30-146-1-1 to 9 inclusive, the [51] first volume being designated as Exhibit 30-A, the others through to I, successively, bearing date of July 29, 1938, and showing receipt by the mail and file room at that time.

The Examiner: The documents described may be marked for identification Commission's Exhibit 30-A, 30-B, 30-C, 30-D, 30-E, 30-F, 30-G, 30-H, and 30-I.

[The documents referred to were marked Commissions Exhibits Nos. 30-A to 30-I, inclusive, for identification.]

Mr. Berman: We ask that there be marked as Exhibit No. 31 the U5S statement of National Power and Light Company comprising four volumes bearing Commission's Docket Nos. 30-146-2-1 to 4 inclusive, the first being designated as A, and the others B, C and D successively, showing receipt by the mail and file room as of May 1, 1939.

The Examiner: The documents described may be marked for identification Commission's Exhibits Nos. 31-A, 31-B, 31-C and 31-D.

[The documents referred to were marked Commission's Exhibits Nos. 31-A to 31-D, inclusive, for identification.]

Mr. Berman: We ask that there be designated as Commission's Exhibit No. 32 the U5S statement of National Power and Light Company for the year 1939 comprising five volumes bearing Commission's Docket Nos. 30-146-2-1 to 5 inclusive, bearing stamp showing receipt by the mail and [52] docket room of the Commission as of June 1, 1940. The first volume will be designated as 32-A and the others as 32-B, C, D and E.

The Examiner: The documents described may be marked for identification Commission's Exhibits Nos. 32-A, 32-B, 32-C, 32-D and 32-E.

[The documents referred to were marked Commis-

sion's Exhibits Nos. 32-A to 32-E, inclusive, for identification.]

Mr. Berman: I should like to have marked as Commission's Exhibit No. 33 the U14-3 statement filed by National Power and Light Company consisting of one volume containing reports for 1938 and 1939 bearing Commission's Docket No. 48-110-1.

The Examiner: The document described may be marked for identification Commission's Exhibit No. 33.

Mr. Berman: I should like to have marked as Commission's Exhibit No. 34 a file containing proxy information filed with the Commission by National Power and Light Company for the years 1938 and 1939 comprising one file bearing Commission's File No. 53-110-1.

The Examiner: The document described may be marked for identification as Commission's Exhibit No. 34.

[The documents above referred to were marked Commission's Exhibits No. 33 and 34, respectively, for identification.]

[53] Mr. Berman: I should like to have marked as Commission's Exhibit No. 35 the Form 10 statement filed by National Power and Light Company under the Securities and Exchange Act of 1934 consisting of one volume bearing Commission's Docket No. 1-221-1 bearing stamp showing receipt by the file room of the Commission as of April 2, 1935.

The Examiner: The document described may be marked for identification Commission's Exhibit No. 35.

[The document referred to was marked Commission's Exhibit No. 35 for identification.]

Mr. Berman: I ask that there be marked as Commission's Exhibit No. 36 Form 10-K and 8-K statements filed by National Power and Light Company under the Securities and Exchange Act of 1934 consisting of one volume bearing Commission's Docket No. 1-221-2.

The Examiner: The document described may be marked for identification Commission's Exhibit No. 36.

[The document referred to was marked Commission's Exhibit No. 36 for identification.]

Mr. Berman: The documents which have been marked as Commission's Exhibits 30 to 36 inclusive contain the same information with respect to National Power and Light Company as was previously enumerated in introducing Exhibits 16 to 22, inclusive, for American Power and Light [54] Company. These dockets and filed are offered as exhibits subject to the same terms and conditions stated previously with respect to the similar documents offered for Electric Bond and Share Company. I ask that they now be admitted in evidence.

The Examiner: Admitted under the same conditions as the others?

Mr. MacLane: Yes.

The Examiner: Very well.

[The documents referred to previously marked for identification Commission's Exhibits Nos. 30 to 36, inclusive, were received in evidence.]

Mr. Berman: At this point, Mr. Examiner, I understand that counsel for the respondent would like to adjourn for the lunch period in order that they may keep an engagement. If that is satisfactory to you, sir.

The Examiner: Do you have more documentary evidence?

Mr. Berman: Not as much as might appear to the eye. Some of that material will be omitted as not being necessary.

The Examiner: You intend to proceed with some additional documents?

Mr. Berman: Yes, we do have additional documents.

[55] The Examiner: All right, two o'clock?

Mr. Berman: Is two o'clock satisfactory to you gentlemen?

Mr. MacLane: Yes.

The Examiner: All right.

[Whereupon, at 12:20 o'clock P.M., a recess was taken until 2 o'clock P.M., this day.]

[56] AFTERNOON SESSION.

[Pursuant to the taking of the noon recess, the hearing was resumed at 2 o'clock P.M.]

The Examiner: Are you ready to proceed, gentlemen?

Mr. Berman: Subject to the same terms and conditions as were stated above in connection with the dockets previously offered, we offer in evidence as Commission's Exhibit 37, I believe, the U-13-60 statement filed by Ebasco Services, Inc., consisting of one volume, bearing Commission's Docket No. 49-24-1, stamped as received by the Securities and Exchange Commission file room on March 30, 1940. This report contains the following information, with respect to the period commencing January 1, 1939 and ending December 31, 1939:

Item 100 is a comparative balance sheet for Ebasco Services, Inc.;

Item 110 is a list of investments;

Item 130 refers to the capital stock of Ebasco;

Item 170 deals with the reserves;

Item 200 deals with the income account;

Item 300 with the earned surplus account;

Item 205 with the allocation of charges for services rendered at cost and at other than cost;

[57] Item 210, allocation of charges for services to construction, sales of goods and other services;

Item 215, analysis of billing for service rendered at cost;

Item 220, analysis for billing for service rendered at other than cost;

Item 230, construction, sales of goods, and other services showing charges to service companies;

Item 235, miscellaneous data as to gross additions to fixed

capital, operating revenues and numbers of customers on serviced companies;

Item 240, bases and methods of allocation of charges for services;

Item 245, compensation for officers, directors and so forth;

Item 246, departmental analysis of salaries;

Item 250, service purchased;

Item 255, advertising;

Item 260, dues and memberships;

Item 265, contributions and donations;

Item 270, other expenses;

Item 275, taxes;

Item 305, dividends. I ask that this exhibit be received subject to the same conditions as stated previously.

[58] Mr. MacLane: We are making no objection subject to the reservations and so forth which have been stated.

The Examiner: It is accordingly admitted under the same conditions as the other.

[The document referred to was thereupon received in evidence as Commission's Exhibit 37.]

Mr. MacLane: I just want to remark that I fail to see under the issues as suggested at this time, how that particular report is connected with the matters here involved. You don't need to answer that, Mr. Berman, but I thought I ought to make a specific statement.

Mr. Berman: We have preserved the right of counsel to object to the relevance of any of this material, and should it appear to you later that it is not relevant to the issues, you, of course, will have a right to object to it on that ground.

Mr. Berman: Subject to the same conditions and terms previously stated, we offer as Commission's Exhibit 38 a record of the proceedings before this Commission in connection with the declaration of Ebasco Services, Inc. under Rule U-13-22, and Section 13 of the Public Utility Holding

Company Act of 1935, and its application for exemption from the requirements of that section and the Commission's rules in respect of services rendered to the subsidiaries of American and Foreign Power Company, Inc.

[59] This record consists of three volumes, bearing Commission's Docket Nos. 37-31, 1 to 3, and 17 volumes of exhibits bearing the docket Nos. 37-1-31-1, 1 to 17, and there are also two volumes in connection with the application for exemption stated above bearing the docket Nos. 37-44-1, 1 and 2. I ask that the three volumes being the record and transcript of the proceeding, be designated 38 (a), (b) and (c), respectively, and the 17 volumes of exhibits be numbered successively from 38(d) on. I ask also that the volumes 37-44, 1 and 2, which are identified as pertaining to the application for exemption, be designated Exhibit 38(u) and 38(v).

Mr. MacLane: That is agreeable, subject also to the remarks that I made with respect to the 37 exhibit.

The Examiner: Admitted.

[The documents referred to were thereupon received in evidence as Commission's Exhibits 38(a) to 38(v), inclusive.]

Mr. Berman: Subject to the same terms and conditions previously stated, we offer as Commission's Exhibit 39 the record of a proceeding in the application of Pennsylvania Power & Light Company, pursuant to Form U6B7, this record consisting of three volumes, bearing Commission's Docket No. 32-164-1, 1 to 3 inclusive, and I [60] ask that the first volume be designated Commission's Exhibit 39(a) and the others 39(b) and 39(c) successively.

The Examiner: They may be so marked.

[The documents referred to were thereupon marked as Commission's Exhibits 39(a), (b) and (c) respectively for identification.]

Mr. Berman: This record contains information with re-

spect to the application of Pennsylvania Power & Light involving the issue and sale of $95,000,000 principal amount of first mortgage bonds, 3½ series, due 1969, and other debentures and certain notes. This record, Mr. Examiner, is offered, solely for the light which it throws upon the relations between Pennsylvania Power & Light Company and its parent company, National Power & Light Company, a respondent herein, and Ebasco Services, a respondent herein, and for the relations and the functions performed by each of these various companies. I ask that it be received subject to the same conditions as stated before.

Mr. MacLane: No objection at this time.

The Examiner: It may be admitted accordingly.

[The documents referred to were thereupon received in evidence as Commission's Exhibits 39(a), (b) and (c) respectively.]

[*61*] Mr. Berman: Subject to the same statements we offer as Commission's Exhibit 40 the U6B7 statement filed by Portland Gas & Coke Company, consisting of two volumes, bearing Commission's Docket Nos. 32-179-1, 1 and 2, and ask that they be designated as Commission's Exhibits 40(a) and 40(b). They are offered for the same purpose as Exhibit 39, in connection with Pennsylvania Power & Light, and I ask that they be admitted.

Mr. MacLane: That involved, did it not, an extension of the bonds, an issue of $600,000 stated at par or some kind of value.

Mr. Berman: That involved the extension of maturity from January 1, 1940 to January 1, 1950, of the company's first and refunding 5 per cent and first lien and general 4½ per cent mortgage bonds, and the issue and sale to American Power & Light Company of 6,000 shares no par common stock for $600,000.

Mr. MacLane: Thank you.

The Examiner: Admitted under the same conditions.

Mr. MacLane: That is satisfactory.

[The documents referred to were thereupon received in evidence as Commission's Exhibits 40(a) and 40(b) respectively.]

Mr. Berman: Subject to the same terms and conditions, and for the same purposes as the foregoing, I offer the [62] U-1 statement filed by Kansas Gas & Electric Company, comprising two volumes, bearing Commission's Docket No. 70-23-1, volumes 1 and 2, and ask that they be designated as Commission's Exhibits 41(a) and 41(b) respectively. This application involved the issue and sale of $16,000,000 principal amount by Kansas Gas & Electric Company of first mortgage bonds, 3⅜ per cent series, due 1907.

Mr. MacLane: That is satisfactory under the same conditions.

The Examiner: Admitted under the same conditions.

[The documents referred to were thereupon received in evidence as Commission's Exhibits 41(a) and 41(b) respectively.]

Mr. Berman: Subject to the same terms and conditions and for the same purposes, we offer as Commission's Exhibit No. 42, the Form U6B7 statement filed by Washington Water Power Company consisting of two volumes, bearing Commission's Docket Nos. 43-220-1, 1 and 2, and ask that they be designated as Commission's Exhibits 42(a) and 42(b) respectively.

Mr. MacLane: The same stipulation.

The Examiner: Admitted under the same conditions.

Mr. Berman: This application involved the issue and sale of $22,000,000 principal amount of first mortgage [63] bonds, 3½ per cent series, due 1964.

[The documents referred to were thereupon received in evidence as Commission's Exhibits 42(a) and 42(b) respectively.]

Mr. Berman: Subject to the same terms and for the same

purposes, we offer as Commission's Exhibit 43 the U6B7-1 application of Northwestern Electric Company, consisting of four volumes, bearing Commission's Docket Nos. 32-173-1, 1 to 4 inclusive. This application involved the issue and sale of $6,700,000 principal amount of first mortgage bonds, 4 per cent series, due 1969, and $2,800,000 principal amount of 4½ per cent debentures due 1959. I ask that the volumes be designated 43(a), (b), (c) and (d) successively.

The Examiner: They may be so marked, and received in evidence.

[The documents referred to were thereupon received in evidence as Commission's Exhibits 43(a), (b), (c) and (d).]

Mr. Berman: Subject to the same terms and conditions and for the same purposes, I offer the U-1 statement filed by Carolina Power & Light Company, consisting of three volumes, bearing Commission's Docket No. 70-51-1, 1 to 3 inclusive, and I ask that they be designated as Commission's Exhibits 44(a), (b) and (c). [64] Volume 3 is apparently not in the room at this moment. We ask that 44(c) be reserved for that volume when found.

The Examiner: Commission's Exhibits Nos. 44(a) and (b) may be received and Commission's Exhibit 44(c) will be reserved for the document which will be supplied later.

[The documents referred to were thereupon received in evidence as Commission's Exhibits 44(a) and 44(b).]

[The Commission's Exhibit No. 44 (c) was reserved for the above mentioned volume.]

Mr. Berman: Subject to the same conditions as stated with respect to the dockets and files previously introduced, we offer in evidence copies of annual reports issued by Electric Bond and Share Company for the period 1929 to 1938, inclusive, and we ask that they be marked and entered as a single exhibit, namely, Commission's Exhibit 45.

The Examiner: They may be admitted.

[The document referred to was thereupon received in evidence as Commission's Exhibit 45.]

Mr. Berman: I might state for the record, Mr. Examiner, that the 1939 report of this company and the other respondents is included in the U5S statements for 1939, for these respective companies, previously put in evidence. Subject to the same conditions as the foregoing, we [65] offer in evidence the annual reports of American Power & Light Company for the years 1929 to 1938, inclusive, and ask that they be marked as a single exhibit, namely Commission's Exhibit 46.

Mr. MacLane: Satisfactory after the same conditions.

The Examiner: Admitted accordingly.

[The document referred to was thereupon received in evidence as Commission's Exhibit 46.]

Mr. Berman: On the same terms and conditions we offer the annual reports of Electric Power & Light Corporation for the years 1929 to 1938, inclusive, and ask that they be designated as Commission's Exhibit 47.

The Examiner: They may be received under the same terms and conditions.

[The document referred to was thereupon received in evidence as Commission's Exhibit 47.]

Mr. Berman: Subject to the same terms and conditions we offer the annual reports of National Power & Light Company for the years 1929 to 1938, inclusive, and ask that they be admitted as Commission's Exhibit 48.

The Examiner: Admitted under the same conditions.

[The document referred to was thereupon received in evidence as Commission's Exhibit 48.]

Mr. Berman: We have requested certain information with respect to the number and percentage of shares voted [66] at the stockholders' meetings of the respondents and certain other information. We have been advised by Mr. Samuel Murphy of Electric Bond and Share Company, that

this information will be supplied to us as soon as available, and I should like at this time to reserve an Exhibit No. 49 for this information and relevant information based thereon, to be placed in evidence when received.

Mr. MacLane: Satisfactory.

The Examiner: The record will contain such reservation.

[Commission's Exhibit No. 49 was thereupon reserved for the above information.]

Mr. Berman: We offer in evidence as Commission's Exhibit 50 a tabulation prepared by the Commission's staff showing volume of trading on certain national stock exchanges, and the range of prices in the shares of Electric Bond and Share Company, American Power & Light Company, Electric Power & Light Corporation, National Power & Light Company, for the year 1939 as reported in the New York Times of January 2, 1940.

The Examiner: Any objection?

Mr. MacLane: I think I would say not even though—

The Examiner: You mean you would like the right to check it?

[67] Mr. MacLane: Yes.

The Examiner: I will admit it subject to notification by the respondents as to any errors. The respondents, however, are charged with the responsibility of bringing any errors or exceptions he wants to take to my attention during the course of the hearing. Otherwise it is admitted for the same general purpose.

Mr. MacLane: Subject to the same reservations as to relevancy.

[The document referred to was thereupon received in evidence as Exhibit No. 50.]

The Examiner: Is that all the voluminous documentary evidence you have to offer?

Mr. Berman: It is, Mr. Examiner.

The Examiner: I would like to say this: Of course, both

sides having stipulated that the evidence be admitted under the terms and conditions noted in the record, I have allowed it at this time. However, I would like to say that there is a possibility that I may wish to change my ruling as to the admission of this voluminous evidence. My thought is—and I am only throwing this out as a suggestion and as a practical matter—I am not presuming to tell counsel for the Commission how they should present their case, and I am aware that I don't know anything about it except the pleadings and what is contained in [68] the order and notice of hearing. On the other hand, I think Dr. Splorn once said of some of these holding companies, he described them as empires of scatteration. I should like to prevent that from developing into a record of scatteration, and as a practical matter, when I see a wagonload of documents put into evidence it does seem to me that if possible counsel ought to work out some method whereby pertinent and relevant information would be segregated. The thought I have in mind is this: It is a good deal like telling a man that he is guilty of doing certain things and then presenting a record of all he ever wrote, said or did, as evidence of the charge, and it was my thought that I just want to ask you if it is possible to work out something along this line. The Commission has alleged in its orders that these respondents have indulged in certain activities which are enumerated in the order 1, 2 and 3. I am quite sensible to the fact that it is quite complicated and a great many cases are involved, but I am wondering whether or not it would not be possible for the Commission to put on its witnesses and through the testimony bring out certain transactions which it regards as evidence of that fact, and to submit proof from these documents in [69] substantiation of it, rather than to put all these documents in first, I don't know whether it is possible to work it out that way or not, but if it is, it seems to me

that it will build up a much clearer record and in a way that will be much fairer to the respondents.

Mr. Berman: Mr. Examiner, we feel that perhaps these dockets are much more awesome in appearance than they are in fact. We feel that they contain information which, as we said at the start when we first introduced them, ought to be available for reference by both sides to the extent that they are material, and to the extent that they are immaterial they will subsequently be disregarded. As an instance of what I mean, consider the U5B statement of American Power & Light which comprised 14 volumes. That is a very imposing array of volumes and it does not surprise us that you feel, Mr. Examiner, that it would impose a tremendous burden on the respondents to familiarize themselves with the contents of those volumes. But upon analysis it is found that two volumes are taken up by copies of charters and by-laws of American Power & Light Company and its underlying companies. That is all material which we ought to have a right to refer to. [*70*] It certainly bears on the issues of stock, voting rights of the stock, capitalization of the company, and we can't say at this time that we want to refer to Section 32 of the charter and by-laws. We feel that the entire charter and by-laws of the respondents are relevant in this proceeding. There is nothing new or formidible about them. The respondents drafted them and signed them and know what they contain. In similar manner there are four volumes in that statement devoted to the indentures of American Power & Light Company and its underlying subsidiary companies. They are voluminous documents, but they were prepared by the respondents or their attorneys, and they, of course, know what is in them and we feel they ought to be available for such reference as is seen fit.

The Examiner: Isn't it possible to develop through

testimony those particular portions which have probative value in this proceeding?

Mr. Berman: That will be done at a time which will afford the respondents notice of what we are relying on. We stated in the meantime that they are introduced merely for the purpose of subsequent reference. We have the feeling that neither the Commission nor counsel for the respondents should be foreclosed from [71] referring to the charter and by-laws of the corporation, because it is not in evidence, and yet we don't want to put someone on the stand to testify to what section 17 is before we can put in that document. It seems to us that these fundamental documents are basic to the proceeding, and should be here for purposes of reference, and as the proceeding goes on, I think the field of materiality will be narrowed so that ultimately we may find that certain of the charters and by-laws can be dropped out of the record if need be.

The Examiner: Let me ask you this: Would it serve your purpose to have this material marked first for identification only, and then have relevant and material portions admitted as the testimony develops, or as you go on and the materiality of a particular portion becomes apparent?

Mr. Berman: No, Mr. Examiner, we don't feel that would be the proper procedure. We feel these volumes are properly in evidence for the purpose of reference by the parties and that they belong in the record. As we say, we don't feel that either side should be foreclosed from referring to them because they are not in the record or part of it. At the time of our proposed findings of fact, if they are based on any parts of those records, we will certainly [72] specify what part they are based upon and counsel for the respondents will be able to allude to and contest the materiality or relevancy of those parts, and make whatever objections they find are necessary. We feel that while the procedure that has been followed may be a little cumbersome, it is

necessary because of the number of these documents and their importance. Furthermore, in connection with the U5B form, volumes 8 to 14 contain copies of reports to the state commissions and Federal Power Commission by the respondents or their subsidiaries, and they are familiar with these matters, so that these 14 volumes which comprise the U-14-B form of American Power & Light contain no great mass of material for the respondents to acquaint themselves with. They have copies in their offices and—

The Examiner: I am sensible of the fact that the respondents are legally charged with knowledge of the contents because it was prepared by them or their affiliates. I am amenable to suggestion. If counsel could work out something that will eliminate some of this, I think everybody will be in favor of it, including myself. For the time being we will proceed along the lines to which counsel for both sides have agreed.

Mr. MacLane: I was going to ask you, Mr. Examiner, [73] to kindly reserve ruling until counsel for the Commission has completed offering the exhibits that he proposes to offer. There are a few more, are there not?

Mr. Berman: There are several.

Mr. MacLane: Of course, when this is all in, depending on what course counsel for the Commission proposes to pursue, I may wish to make a motion which will formally present this matter for your ruling and I don't want to take up the time and interrupt the proceedings prematurely, so I will ask you to reserve a definitive ruling until that time.

The Examiner: Very well.

Mr. Berman: We offer as Commission's Exhibit No. 51, statement of capitilization and surplus and distribution of voting power of Electric Bond and Share Company as of December 31, 1939. I may state that the source of this material is stated at the bottom of the exhibit as Docket

No. 30-139-2, Items 8 and 8b and Exhibit B, all taken from the statements filed by the respondents themselves.

Mr. MacLane: Now, does this reference to source refer to some one of the many exhibits which were introduced?

Mr. Berman: Yes.

Mr. MacLane: Could you tell me which one for [74] identification?

Mr. Berman: The volume stated is Docket 30-139-2 which has been received in evidence as Exhibit 13.

Mr. MacLane: There is no objection to it then, subject to check.

[Discussion off the record.]

The Examiner: I want to say again that the respondents are charged with the responsibility of bringing any correction or exception that they deem necessary to my attention.

Mr. MacLane: We understand that. I would like to ask another question of counsel as to this exhibit. Is the second page of the exhibit which states further distribution of voting power between preferred and common stocks, a computation from information in this Exhibit 13, or does it reflect by copying figures in Exhibit 13?

Mr. Berman: The percentages are our computations based upon the figures submitted in Exhibit 13 by the respondent.

Mr. MacLane: And the computation is made by whom?

Mr. Berman: The computation is made by the staff of the Commission. We understand that counsel for the respondent will have the right to challenge the correctness of any of these figures if subsequently they determine they are not correct.

[75] Mr. MacLane: Well, now, Mr. Examiner, this presents one of the problems that this method of procedure puts to us. Here is a list here of certain shares of stock of different classes, $5 preferred, $6 preferred and common stock, and then against each is assigned the voting power

which those shares have which is exactly one vote for each share of stock. That is, of course, to the best of my recollection a correct statement. And then that is developed mathematically into a certain statement of percentage. Without checking it mathematically I presume the mathematics are correct. But the figures are related back to the capital figures which are taken from the first sheet of the exhibit and they ignore the surplus figures altogether, and it might be contended—I don't say whether it does or not from just a moment of examination,—but it certainly may be very reasonably contended to adduce a mathematical exercise that has no relation at all to reality.

The Examiner: What kind of reality? That covers so much territory.

Mr. MacLane: I would suppose that one might draw the inference from these two tabulations, sheets 1 and 2 of this exhibit, and I would say from giving it a very [76] hasty examination—and that is the trouble with this proceeding—as I am saying, that 4.8 per cent of the capitalization as shown on sheet 1 represents 78.30 per cent of the voting power as shown on sheet No. 2. Now, on the other hand, if you take the par value of the common stock and the stated capital surplus and earned surplus, you arrive at a result in which the percentage applicable to common stock and investment as per books, bears an almost direct ratio—again guessing very quickly from the figures and not attempting to be entirely accurate—to the values or asset values which are assignable or attributable to the common stock.

The Examiner: Those are purely interpretation—

Mr. MacLane: Those are purely matters of interpretation.

The Examiner: Whatever weight or interpretive value is to be given any particular evidence is a matter of debate.

Mr. MacLane: It seems to me the proper way to present such evidence as this would be through the witness, or

through the person who prepared the computation, and develop the theory upon which he made his computation and the alternative theory which might be applied.

The Examiner: It might also be a matter of cross examination.

[77] Mr. MacLane: That is what I mean. To merely give us this sheet of paper without an opportunity to examine the witness or even to analyze the piece of paper, does violence to my theories of orderly procedure.

[78] The Examiner: It does seem to me that there should be something—of course, I haven't seen the document and don't know what it is—unless this information was submitted in the form of a document it might be used as an admission against the person offering it against the respondent. It does seem to me that the method of computation and the source of the material should be given before the document is admitted or offered into evidence.

Mr. MacLane: May I suggest we let it stand subject to the same general objection and the motion I shall make later?

Mr. Berman: May I suggest, Mr. Examiner, that we are not offering this exhibit for the conclusions to be drawn from it, and counsel for the respondents is not bound by any conclusions as may be drawn from it, and will have full opportunity to make whatever statement, present any evidence he wishes, and examine and cross examine whoever prepared it. We are offering it for a compilation of figures based upon source information submitted by the respondents themselves. The method of calculation is obvious. We can not accord voting power to the surplus, when surplus does not have voting power. The voting power is distributed among several classes of stock and that is what [79] we say. The capitalization is distributed among various classes of stock and amongst capital surplus and earned surplus. However, if Judge MacLane wishes us to,

we will put on the stand the man who prepared it, although it seems plain how it was computed, and he will state how he computed it and where he got his information and it seems to me that is all that is required to validate the statement for admission as an exhibit.

The Examiner: There is nothing here to show its source. These figures may have been gotten from a dozen different volumes by a dozen different men, so I think I will have to sustain the objection of counsel unless you will identify the sources.

Mr. Berman: We have identified the source at the bottom of the exhibit. It is stated to be Docket 30-139-2, items 8 and 8-B in Exhibit B, and that has been stated to be Commission's Exhibit 13, and we have stated that we ourselves computed the percentages. That it seems to me is precisely based and indicated, but if further information is desired on that point we have no objection to putting on the man who prepared it to state with greater precision, if possible, although I don't know how it would be, where the figures were derived.

The Examiner: Counsel, if you insist on the objection [*80*] I will sustain it. I don't think it is properly identified for the record unless you are willing to concede it. If you press your objection I will sustain it.

Mr. MacLane: I stated at the outset of this proceeding that I had no desire to be technical, but it seems to me this exhibit was drafted for the purpose of adducing a mathematical inference which I think is factually incorrect. The mere matter of the figures may be right, but all the elements that should be taken into the equation have not been taken into it.

The Examiner: Do you insist upon your objection?

Mr. MacLane: I insist upon the objection or else I ask leave to renew my objection in connection with my motion which I expect to make at the close of this presentation.

The Examiner: Well, I can't blow hot and cold. I have to make a ruling one way or the other.

Mr. MacLane: If you feel that you must rule at the moment I feel I must insist on my objection at the moment.

The Examiner: The objection is sustained until a better foundation is laid for the testimony.

Mr. Berman: Will you kindly indicate, Mr. Examiner, as the basis for your ruling, what information you feel has not been given here which would validate the exhibit?

[*81*] The Examiner: Sworn testimony as to the source of the material, and submit the document to the proper cross examination by counsel for the other side.

Mr. Berman: Cross examination as to the source and basis?

The Examiner: Cross examination as to source and basis.

Mr. Berman: We take exception to your ruling, if we may, Mr. Examiner, and we ask for a short recess.

The Examiner: We will take a short recess.

[Short recess.]

The Examiner: Proceed, gentlemen. The exhibit will be marked for identification only until a foundation is laid in accordance with the Examiner's previous statement.

[The document referred to was marked Commission's Exhibit No. 51 for identification.]

Mr. Berman: Mr. Examiner, with respect to the discussion that took place immediately preceding the recess, it has been agreed between the parties that at this time we should proceed to introduce a series of tabulations including the one marked as Exhibit 51, all for the purpose of identification only, and that at tomorrow's session we will put our witnesses on the stand to qualify them as you have indicated is proper. So for the purpose of the record, we wish it stated [*82*] that the document marked as Exhibit 51 is not in evidence but is merely marked for identifi-

cation. And we ask that there be marked for the purpose of identification a tabulation of the capitalization and surplus and distribution of voting power of the American Power and Light Company as of December 31, 1939, the source being indicated at the bottom of said tabulation. We ask that it be marked for identification as Exhibit 52.

The Examiner: It may be so marked.

[The document referred to was marked Commission's Exhibit No. 52 for identification.]

Mr. MacLane: If it is not too much trouble I would appreciate it if you would tie this in to the exhibits as you identify them.

Mr. Berman: You mean as to the source?

Mr. MacLane: Yes.

[Discussion off the record.]

Mr. Berman: It is Exhibit 18, but we will have to check the volume for the letter and we will advise you.

Mr. MacLane: That is sufficient for my purpose.

Mr. Berman: Do you wish to see copies of this, Mr. Examiner?

The Examiner: I don't think it is necessary as long as they are being marked for identification only.

[83] Mr. Berman: I ask that there be marked for identification a tabulation of the capitalization, surplus and distribution of voting power of American Power and Light Corporation as of December 31, 1939, and that it be marked for identification as Commission's Exhibit 53.

The Examiner: It may be so marked.

[The document referred to was marked Commission's Exhibit No. 53 for identification.]

Mr. MacLane: This is marked as coming from Exhibit 8 and 8-B. Is that correct?

Mr. Berman: That Exhibit 8-8-B is not the number of the exhibit which forms a part of this record. It is the exhibit with the U5S form with the docket number given to

that. We will try to get that information from the exhibits for you. We ask that there be marked for identification tabulation of capitalization, surplus and distribution of voting power of National Power and Light Company as of December 31, 1939.

The Examiner: It may be so marked.

[The document referred to was marked Commission's Exhibit No. 54 for identification.]

Mr. Berman: We ask that there be marked for identi-
[84] fication tabulation of the investments of Electric Bond and Share Company in American Power and Light Company, Electric Power and Light Corporation and National Power and Light Company as of December 31, 1939, with the sources of the information indicated, and we ask that it be designated for identification as Commission's Exhibit 55.

The Examiner: It may be so marked.

[The document referred to was marked Commission's Exhibit No. 55 for identification.]

Mr. Berman: We ask that there be marked for identification tabulation showing the excess of carrying value over cost to company originally acquiring securities, of investments of Electric Bond and Share Company in American Power and Light Company, Electric Power and Light Corporation and National Power and Light Company. We ask that it be designated for the purpose of identification as Commission's Exhibit 56.

The Examiner: It may be so marked.

[The document referred to was marked as Commission's Exhibit No. 56 for identification.]

Mr. Berman: We ask that there be marked for identification as Commission's Exhibit 57, tabulation showing investments of Electric Bond and Share Company in subsidiaries of American Power and Light Company, Electric

[85] Power and Light Corporation and National Power and Light Company as of December 31, 1939.

The Examiner: It may be so marked.

[The document referred to was marked Commission's Exhibit No. 57 for identification.]

Mr. Berman: We ask that there be marked for identification as Commission's Exhibit 58 a tabulation of the investments of American Power and Light Company in securities of subsidiary companies as of December 31, 1939.

The Examiner: It may be so marked.

[The document referred to was marked Commission's Exhibit No. 58 for identification.]

Mr. Berman: We ask that there be marked for identification as Commission's Exhibit 59, tabulation of investments of Electric Power and Light Corporation in securities of the subsidiary companies as of December 31, 1939.

The Examiner: It may be so marked.

[The document referred to was marked Commission's Exhibit No. 59 for identification.]

Mr. Berman: We ask that there be marked for identification as Commission's Exhibit 60 a tabulation of investments of National Power and Light Company in securities of subsidiary companies as of December 31, 1939.

The Examiner: It may be so marked.

[86] [The document referred to was marked Commission's Exhibit No. 60 for identification.]

Mr. Berman: We ask that there be marked as Commission's Exhibit 61 a tabulation of the combined consolidated capitalizations of American Power and Light Company, Electric Power and Light Corporation and National Power and Light Company as of December 31, 1939.

The Examiner: It may be so marked.

[The document referred to was marked Commission's Exhibit No. 61 for identification.]

Mr. Berman: We ask that there be marked for identification as Commission's Exhibit 62, tabulation of expenses of Electric Bond and Share Company for the twelve months ending December 31, 1939.

The Examiner: It may be so marked.

[The document referred to was marked Commission's Exhibit No. 62 for identification.]

Mr. Berman: We ask that there be marked for identification as Commission's Exhibit 63 the tabulation of expenses of American Power and Light Company for the twelve months period ended December 31, 1939.

The Examiner: It may be so marked.

[87] The document referred to was marked Commission's Exhibit No. 63 for identification.]

Mr. Berman: We ask that there be marked for identification as Commission's Exhibit 64, statement of expenses of Electric Power and Light Corporation for the twelve months period ended December 31, 1939.

The Examiner: It may be so marked.

[The document referred to was marked Commission's Exhibit No. 64 for identification.]

Mr. Berman: We ask that there be marked for identification as Commission's Exhibit 65, a tabulation of expenses of National Power and Light Company for the twelve months ended December 31, 1939.

The Examiner: They may be so marked.

[The document referred to was marked Commission's Exhibit No. 65 for identification.]

Mr. Berman: We ask that there be marked for identification as Commission's Exhibit 66 a statement of expenses of Ebasco Services, Inc. for the twelve months period ended December 31, 1939.

The Examiner: They may be so marked.

[The document referred to was marked Commission's Exhibit No. 66 for identification.]

[88] Mr. Berman: We ask that there be marked for identification as Commission's Exhibit No. 67 a statement of the undeclared cumulative dividends on preferred stock of American Power and Light Company and Electric Power and Light Corporation.

The Examiner: That will be so marked.

[The document referred to was marked Commission's Exhibit No. 67 for identification.]

Mr. Berman: If it is agreeable with you and counsel for the respondent we think we would like to adjourn until tomorrow morning so I may have time to collect the documents and proceed in an orderly fashion.

The Examiner: Do you have anything you may proceed with to expedite the hearing at this time?

Mr. Berman: There is nothing we want to proceed with at this time. We feel we ought to get the matter of the qualification of these exhibits out of the way before we proceed further, and therefore I would like to adjourn until tomorrow.

The Examiner: Off the record.

[Discussion off the record.]

The Examiner: The hearing stands adjourned until 9:30 tomorrow morning. All interested parties will return at that time.

[89] [Whereupon, at 3:35 o'clock P.M., the hearing in the above-entitled matter was adjourned until 9:30 o'clock A.M., Wednesday, June 19, 1940.]

[90] Hearing Room 1103, Securities and Exchange Commission Bldg., Washington, D. C., Wednesday, June 19, 1940.

Met, pursuant to adjournment, at 9:30 o'clock A.M.

Before: JAMES G. EWELL, *Trial Examiner.*

Appearances:

As heretofore noted.

[91] The Examiner: The hearing will resume, please.

Mr. Berman: Are you prepared to have me proceed, Mr. Examiner?

The Examiner: Yes.

Mr. Berman: At the conclusion of the hearing yesterday, Mr. Examiner, we had entered a number of exhibits marked for purposes of identification with the understanding that we would qualify them this morning for admission as evidence and for that limited purpose only I wish to place Mr. Flanagan on the stand, if I may. I ask that he be sworn.

The Examiner: Very well.

Whereupon.

JAMES H. FLANAGAN

a witness produced by and on behalf of the Securities and Exchange Commission, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. BERMAN.

Q. Mr. Flanagan, have you given your name and address to the reporter? *A.* I have.

Q. Will you please tell us what your present position is? [92] *A.* I am senior analyst in the Public Utilities Division of this Commission.

Q. Have you been with the Commission for some time? *A.* Since December 1, 1935.

Q. And prior to coming with the Commission did you have a varied experience in the field of accounting, auditing and finance work with public utilities and other organizations? *A.* I did.

Mr. MacLane: We are pleased to admit Mr. Flanagan's accounting qualifications.

Mr. Berman: Thank you, sir.

By Mr. Berman:

Q. (By Mr. Berman): Mr. Flanagan, are you familiar

with the document which is marked for identification as Commission's Exhibit No. 51? I show you a copy of such exhibit. *A.* I am.

Q. This is the document to which I refer. *A.* I am.

Q. Have you a copy of it before you? *A.* I have.

Q. Was this tabulation which is before you and which has been identified as Commission's Exhibit No. 51 prepared under your supervision and direction? *A.* It was.

Q. Are you familiar with the contents thereof? [*93*] *A.* I am.

Q. Will you please tell us where you got the variety of information set forth in the first four columns on the first sheet of this exhibit starting with the column headed "Issue"? *A.* The report to stockholders prepared by Electric Bond and Share Company for the year ended December 31, 1939 contains a balance sheet of that company as of that date.

Q. May I interrupt a moment? *A.* Yes.

Q. Is that balance sheet in that report in evidence, Mr. Flanagan, in this proceeding? *A.* A copy of the balance sheet to which I refer is presented in Docket 30-139 which contains the U5S statement of Electric Bond and Share Company for the year 1939, and that balance sheet is contained therein as Exhibit 13-A.

Mr. MacLane: That is Exhibit 13-A in this proceeding. Is that right?

Q. (By Mr. Berman): Is that Exhibit 13-A in this proceeding? *A.* That is Commission's Exhibit 13-A. I am sorry. I will correct that. The company exhibit is D, sheet 1.

Q. The company exhibit to that docket is D, sheet 1? *A.* Yes.

Q. But it is Commission's Exhibit No. 13-A in this [*94*] record? *A.* That is right.

Q. Thank you, Mr. Flanagan. Will you please proceed? *A.* This balance sheet lists the securities of the company outstanding as of that date and states the liquidation value of the capital stock and the par value of the common stock. These descriptions as to stocks outstanding were verified by reference to the company's item 8(b) in the docket number and the Commission exhibit number previously referred to.

The number of shares issued is also contained in those documents and the dollar amount applicable to each class of stock outstanding is also reflected therein. The dollar amount opposite the capital surplus item in this statement and the dollar amount opposite the earned surplus item in this statement were obtained from the company's balance sheet as at December 31, 1939.

Q. Now, Mr. Flanagan, do you have any personal knowledge as to whether the amount stated in these columns correctly reflect the books and accounts of Electric Bond and Share Company? *A.* No, sir.

The Examiner: This is just a suggestion I would like to make. I wonder if it would not be satisfactory procedure if Mr. Flanagan simply stated that he got these figures from [95] Exhibits A, B, C, D and so forth and then turn him over for cross examination by the respondent. My object in insisting upon this procedure is simply to protect the respondent's right to cross examine before the introduction of evidence.

Mr. Berman: I take it the cross examination would be cross examination limited to the matters you mentioned yesterday, that is the source of the material and not as to inferences to be drawn therefrom.

The Examiner: I don't see why there should be any limitation on cross examination.

Mr. Berman: What we are now engaged in doing is qualifying these exhibits for introduction in evidence, and

in order to do so, as you stated yourself in yesterday's hearing, as I recall it, Mr. Examiner, it is necessary that this evidence be identified in sworn testimony, the source identified and the method of computation stated. That having been done it seems to me it becomes qualified for admission.

Now if subsequently the respondent wants to cross examine on other subjects that is a different matter, but as far as the introduction in evidence goes that is all we have to do, as I understand it.

The Examiner: I would not be disposed to limit the cross examination. I don't think documentary evidence is different from any other kind of evidence. If a witness is [96] put on to testify he did so-and-so on a certain date the other side is at liberty to cross examine whether he did something else on a certain date.

Mr. Berman: This witness is not on the stand to testify he did anything except that he set forth certain figures taken from the company's records. He is not here to state what they represent. He is here merely to state where he got the figures and compiled them.

The Examiner: I would not want to lay down any hard and fast rule now. I will take any argument you may have under advisement. In view of a situation of that kind you make an objection and I will pass on it. I don't want to pass on it in advance.

Mr. Berman: Under the circumstances I should prefer, if you don't mind, to proceed to identify the documents on direct examination and proceed to an enumeration of the various items so there will be no question as to where every item was taken and the computation.

The Examiner: My suggestion was for the purpose of saving time. If you don't want to do that you may proceed as you suggest.

Mr. Berman: I am as anxious to save as much time as

anyone else. This point was raised yesterday and it was insisted we proceed in a more thorough manner and now that we are doing it I want to proceed in this way if that is agreeable [97] with you, sir.

The Examiner: All right.

Q. (By Mr. Berman): Now Mr. Flanagan, looking at the figure at the bottom of the fourth column, that is the column headed "Dollar amount per books of issuer," at the bottom of that is the figure of $548,660,805.05. Will you please tell us what that figure represents? A. That is merely the sum arrived at by adding the various items contained in the column above that.

Q. That includes the amount for capital and earned surplus listed immediately above, does it not? A. That is true.

Q. With respect to figures contained in this column, the last column headed "Percent of total capitalization," were those figures set forth on the U5S statement of the respondent? A. No, sir.

Q. Those figures were computed by you? A. Yes, or under my direction.

Q. Now taking the first figure set forth, the percentage of 5.468, would you please tell us how that percentage was arrived at?

Mr. MacLane: I am perfectly willing to admit it is correct as a matter of mathematics.

Mr. Berman: And the method of computation is per- [98] fectly clear?

Mr. MacLane: The method of computation is perfectly clear. I am perfectly willing to admit all the figures stated in the last column of the first sheet of Exhibit 51 are correct mathematical derivatives of the bases stated in the preceding column opposite the respective figures of the last column.

Q. (By Mr. Berman): Now as to the source of the foot-

notes on that page, Mr. Flanagan, were they derived similarly from the U5S statement of the respondent, that is, Commission's Exhibit 13 in evidence? *A.* They were.

Q. Will you kindly turn to the second sheet of this exhibit? *A.* Yes, sir.

Q. Will you kindly state the source of your information for the figures in the first three columns starting from the left-hand side? *A.* The description of the issue and number of shares outstanding and the number of votes attaching to these shares were derived from the same source as previously quoted. However, with respect to the number of common shares outstanding it will be noted that this figure does not agree with the number of shares listed on the capital and surplus statements on the previous page of this exhibit.

[99] *Q.* What is the reason for that, sir? *A.* The reason for that is that on Exhibit D, sheet 1, filed by the respondent, notation is made in the capital stock section of the balance sheet to the effect that the 5,267,146.756 shares of common stock listed therein includes $83,945.45 par value of the scrip. For the purpose of arriving at the voting power attached to these securities I calculated the number of shares which this amount of par value of script might represent and substracted the result from the total number of shares of common stock reflected in the balance sheet.

Q. Now with respect to information set forth in the last column on that page, those percentages were computed by you and I take it in the same manner, more or less as the figures on the other page, or will you state, please, how you computed the percentages, the first 4.47 figure? *A.* This is again a simple mathematical calculation arrived at by dividing 300,000 by the total figures shown under the column headed "Voting power".

Q. Now, Mr. Flanagan, referring once again to the first

page of the exhibit for a moment, the figures set forth as capital surplus and earned surplus, do I understand that these figures merely reflect the sums set forth in the statements of the respondent and you have no knowledge as to whether these figures are actually the true capital sur- [*100*] plus or earned surplus? *A.* That is correct.

Mr. Berman: Mr. Examiner, I now ask that this exhibit be received in evidence.

The Examiner: I reserve decision on that motion until counsel has had an opportunity to cross examine.

Mr. MacLane: Shall I cross examine on this exhibit at this time?

Mr. Berman: Yes, I think the cross examination should be made at this time.

Cross Examination by Mr. MacLane.

XQ. Mr. Flanagan, does this exhibit merely represent a mathematical computation based upon the figures stated, or do you have an accounting theory back of the exhibit? *A.* It merely contains mathematical computation.

XQ. And one could make other combinations of the figures there stated and derive different mathematical results? *A.* By making other combinations that is possibly true.

XQ. Do you say possibly true or actually true? *A.* That is true. I will amend my statement.

XQ. For illustration, if you will refer to sheet 1 of your Exhibit 51 and would add to the dollar amount stated [*101*] as the par value of the common stock the figures for capital surplus and earned surplus and take the derived percentages in the last column, the total of those three merely as a matter of mathematics is 73.469, is it not? *A.* Yes.

XQ. And if that figure of 73.469 were related to the common stock—I am not asking you to agree it is correct to do it—but if it were related to the common stock then

73.469 per cent of the capitalization would have 78.30 per cent of the voting power, would it not? *A.* Yes.

XQ. And so I suppose you are willing to leave to the lawyers to argue whether capital surplus and earned surplus pertaining to the common stock after satisfying the demands of the preferred stock or whether they remain merely as some undistributed balance not applicable to any stock? *A.* I am perfectly willing to leave that to counsel.

Mr. MacLane: I object to the exhibit only as irrelevant and immaterial and not tending to prove or disprove any issue in this case. I have no reason to object on the ground that the exhibit is insufficiently identified.

The Examiner: Objection overruled and the exhibit is received. I will sustain objections to argumentative questions. I would like the examination to be confined to evidence.

Mr. MacLane: Is that a criticism of my examination?

[*102*] The Examiner: I didn't intend it as criticism.

Mr. MacLane: I am trying to be very brief.

Mr. Berman: Judge, I have no criticism to make of your examination.

[The document referred to was marked Commission's Exhibit No. 51 and received in evidence.]

Direct Examination (resumed) by Mr. BERMAN.

Q. Mr. Flanagan, I show you a tabulation which was marked as Commission's Exhibit No. 52 for identification. Have you a copy of this exhibit before you? *A.* I have.

Q. Are you familiar with the contents of this exhibit? *A.* I am.

Q. Was it prepared under your direction and supervision? *A.* Yes, sir.

Q. Now referring to the first four columns, starting with the first on the left-hand side of the sheet, will you please tell us where the information and figures there set

forth were derived? *A.* The annual report to stockholders prepared by American Power and Light Company for the year 1939 which is contained in Docket 30-144, Commission's Exhibit in this [*103*] proceeding No. 18-A, as Respondent's Exhibit F, part 1. This report contains the balance sheet of the company as at December 31, 1939 in which are described the various securities outstanding as at that date. These descriptions of principal amount, liquidating value and number of shares outstanding have also been verified by reference to item 8 (a) and 8 (b) of the Commission's Exhibit 18-A. The dollar amount listed in the fourth column of Exhibit No. 52 was obtained by reference to the aforementioned balance sheet in so far as they refer to long term debt outstanding, preferred stock outstanding, and common stock outstanding. They were also verified by reference to items 8(a) and 7(b). The dollar amount shown opposite capital surplus and earned surplus was obtained from the company's balance sheet for December 31, 1939.

Q. Now with respect to the figures set forth in the last column on this page, were those figures computed by you? *A.* They were.

Q. Were they computed in the same manner as the figures in the last column of the previous exhibit? *A.* They were.

Q. And those percentages total 100 per cent, is that correct? [*104*] *A.* That is correct.

Q. Will you kindly turn to the second page of this exhibit? *A.* Yes.

Q. Now referring to the figures and information set forth in the first four columns of the second page starting with the first column on the left-hand side will you kindly tell us where the information there set forth was derived? *A.* The description of the securities issued and

the amount of securities outstanding was obtained from the sources already mentioned.

Q. You mean the same Commission Exhibit 18-A? *A.* That is right.

Mr. MacLane: That is Exhibit 13-A?

The Witness: 18-A.

Mr. MacLane: 18-A.

The Witness: The figures in the third column were calculated by me to eliminate from the preferred stock $6 outstanding 26.2 shares of scrip and by eliminating from the number of shares of common stock outstanding 2114.27/50 shares of scrip. The calculations reflected in the fourth column were the simple mathematical calculations and were made in the manner previously described in connection with other calculations.

[*105*] *Q.* (By Mr. Berman): Now the figures for the statement represented in the fifth column, where did you derive that information? *A.* By reference to item 9 of Commission's Exhibit 18-A. It was found that American Power and Light Company and its sudsidiaries owned none of the securities listed in the first three columns of this statement.

Q. Now with respect to the information set forth in the last three columns on that page. Where was that derived? *A.* Docket No. 30-139, Commission's Exhibit in these proceedings 13-A contains the list showing the investment of Electric Bond and Share Company in its subsidiary companies.

The principal amount or number of shares of $5 preferred stock and common stock shown as owned by Electric Bond and Share Company was obtained from such item 9.

Q. And the percentages in the last column were derived by you in the same manner as those previously described for Exhibit 51? *A.* That is right.

Q. And looking at the total at the bottom of the last

column, 20.70 per cent being the percentage of voting securities owned by Electric Bond and Share Company, can you tell us whether you know how this figure compares with paragraph 24 of the answer filed by the respondent in this case? *A.* It is the same.

Q. Does the same figure appear in any other docu-
[*106*] ment included in evidence in this proceeding? *A.* The same figure appears in Exhibit A filed by the Electric Bond and Share Company with its U5S statement for the year 1939 which is contained in Docket No. 30-139 which in turn is this Commission's Exhibit 13-A.

Q. I believe it is Commission's Exhibit 13. I don't believe we have a 13-A, or am I mistaken? *A.* That is true. There is only one docket filed, Exhibit 13.

Q. Now with respect to the items of capital surplus and earned surplus shown on the previous page of this exhibit, you have no actual knowledge as to the state of this capital surplus or earned surplus, have you? *A.* No, sir.

Q. This is intended to merely reflect the statement made on the statements filed with this Commission by the respondent? *A.* That is correct.

Mr. Berman: Mr. Examiner, I ask this exhibit be received in evidence.

The Examiner: Same ruling. The ruling is reserved until cross examination has been had.

Cross Examination (*resumed*) *by* Mr. MacLane.

XQ. Mr. Flanagan, Exhibit No. 52 was prepared in the
[*107*] same manner and under the same conditions and with the same objective as Exhibit No. 51, which you have just identified before this and relates to American Power and Light Company capital and voting power in the same way that Exhibit 51 relates to the Electric Bond and Share Company capitalization and voting power? *A.* Yes.

XQ. And it is subject to the same statements as to its

method of preparation and possibility of different combinations? *A.* Yes.

XQ. Referring to the second sheet of Exhibit No. 52, each share of stock both preferred and common has one vote, I take it? *A.* Yes.

XQ. And the greater number of shares of common per dollar of capitalization in relation to the preferred is the factor that is responsible for the higher percentage of voting power in the common as related to capitalization than as attributable to preferred?

Mr. Berman: May I ask that question be read?

(The reporter thereupon read the pending question as recorded.)

Mr. MacLane: Is it too obscure?

Mr. Berman: Yes, Judge, it is a bit.

Mr. MacLane: Strike the question if you wish and I [*108*] will rephrase it.

XQ.(By Mr. MacLane): Roughly speaking, and without attempting to get down to mathematical nicety each share of common represents approximately $12.50 of ledger value of assets attributable to the common. Is that right?

Mr. Berman: Just a moment, please. Will you read that, please?

(The reporter thereupon read the pending question as recorded.)

Mr. Berman: May I ask did you arrive at that figure by dividing the total number of common shares and the dollar amount per books of the issuer, or how?

Mr. MacLane: Yes.

Mr. Berman: On the first page.

Mr. MacLane: On the first page.

Mr. Cohen: It seems to me that is a question to be left to argument of counsel.

Mr. MacLane: That is a proper question on cross examination.

Mr. Berman: I object to that question. If Judge MacLane wants to ask if each share of common and each share of preferred has one vote, that is all right and that would explain why common has more than preferred because there are more shares outstanding.

[*109*] Mr. MacLane: I have already asked that question.

The Examiner: Does the figure that the Judge mentioned appear in the exhibit, or is it a figure he has computed himself?

Mr. Berman: That is a figure the Judge has apparently computed. We don't show the per share value of common, either assets or ledger value at any point, but I suppose that could be done as a matter of arithmetical computation. I have no reason to think the Judge's computation is wrong. It seems to me the question should be directed to the figures on this exhibit.

Mr. MacLane: I am willing to rephrase the question if that is your objection.

The Examiner: All right.

Mr. MacLane: I will rephrase the question.

XQ. (By Mr. MacLane): Referring to sheet 1 of Exhibit 52, the 3,013,812.54 shares is represented on the asset side of the ledger of the American Power and Light Company by $37,434,351.29 bookvalue of assets, is that correct? *A.* No, sir.

Mr. Berman: Not on the asset side, the capital account side.

Mr. MacLane: I should not have said asset side. I meant the liability side.

[*110*] The Witness: In the capital stock account.

XQ. (By Mr. MacLane): In the capital stock account. *A.* That is correct, yes.

XQ. I am not an accountant. I will have to be excused. *A.* Yes

XQ. That of course is irrespective of the question of what capital surplus or earned surplus shown in additional amounts on sheet 1 should be attributed to common stock in arriving at another computation which somebody else might make as to distribution of voting power. Is that right? *A.* That is so.

XQ. And as I asked you with respect to Exhibit 51, the sum of the three figures shown in the last three columns in the last column of Exhibit 52 would, as I figure, amount to 17.601. Is this correct? Could you verify it for me? *A.* Yes.

XQ. Referring to sheet 2 of your Exhibit 52, distribution of voting power to both preferred and common stock owned by Electric Bond and Share Company follows exactly, does it not, the percentage of distribution of voting power attributable to those shares in the hands of other owners? [*111*] *A.* Yes.

XQ. That is, there is no mathematical distortion as applied to the two sets of computations made between those in the first three columns of Exhibit 52, page 2, and the last three columns? *A.* No, sir.

XQ. So that the ownership of 20.70 per cent of the voting stocks by Bond and Share carries with it 20.70 per cent of voting power? *A.* Yes.

Mr. Cohen: Will you please repeat that last question?

[The reporter thereupon read the preceding question and answer thereto as recorded.]

XQ. (By Mr. MacLane): One more question. It is perfectly clear from the record, but since the record is so voluminous I would like to ask directly. Following the last question a share of either preferred or common stock owned by Electric Bond and Share carries with it just exactly the same voting power as a share of either preferred or common stock owned by somebody outside the system entirely? *A.* I don't feel I am qualified to answer

that, Judge MacLane. This statement simply shows that if we make mathematical calculations of the number of votes per- [112] taining to the total securities outstanding and assume and also use one vote per share to those shares owned by Electric Bond and Share we arrive mathematically at the percentage of voting securities owned by Electric Bond and Share of 20.70.

XQ. Well, for arriving at that percentage the computation necessarily assumes that is the fact, does it not? *A.* I didn't intend to make any assumption by presenting this statement, Judge MacLane. It is merely a mathematical computation.

XQ. You don't make any contention otherwise? *A.* I make no contention one way or the other.

Mr. MacLane: That is all. I just make the same general objection. I admit that the exhibit is sufficiently identified. I object to its relevancy and materiality and not tending to prove or disprove any issue in this case.

The Examiner: The objection is overruled and the exhibit admitted.

[The document previously marked Commission's Exhibit No. 52 for identification is received in evidence.]

Mr. Cohen: Could I ask one question?

The Examiner: Yes.

[113] *XQ.* (By Mr. Cohen): I think about two questions back the question I asked to be read a moment ago as phrased by Judge MacLane was whether the 20.70 per cent of voting power is attributable to the common stock held by Electric Bond and Share Company. Does not the computation in the last column of this second page of Exhibit 52 indicate that the 20.70 is the sum of 19.62 applicable to common stock and 1.08 applicable to preferred stock? *A.* That is true.

Mr. Cohen: That is all.

Mr. Berman: Is the exhibit received in evidence?

The Examiner: It has been admitted.

Mr. MacLane: I assume, Mr. Examiner, it is neither necessary nor will any purpose be served by entering formal exception to the ruling?

The Examiner: I will say this, the record will show either party automatically has an exception to any adverse ruling by myself.

Mr. Berman: With respect to a tabulation marked for identification as Exhibit 52 I wish to say at this time, Mr. Examiner, it was discovered there was one figure there which while it was correct was susceptible of misunderstanding and in order to avoid any ambiguity a change has been made which I will point out to counsel and I ask [*114*] permission to substitute the corrected page for the other.

The Examiner: Very well.

Direct Examination (resumed) by Mr. Berman.

Q. I show you, Mr. Flanagan, a tabulation marked for identification as Exhibit No. 53. Have you a copy of that tabulation before you? A. I have.

Q. In its revised form? *A.* Yes.

Q. Are you familiar with the information contained in this tabulation? A. I am.

Q. And was it, like the others, prepared under your direction and supervision? A. It was.

Q. Will you tell us in a general way where you derived the information contained in the first four columns starting with the first column on the left-hand side of the page? *A.* Electric Power and Light Corporation has filed with its U5B registration statement for the year 1939 an annual report to stockholders for the year 1939 as Exhibit F, Part 4. This registration statement is Docket 30-143 and has been filed herein as Commission's Exhibit 25-A.

[*115*] *Q.* Commission's Exhibit 25-A in evidence? *A.* Yes. The long term debt issues described in the first column

of Exhibit 53, as revised, and the principal amount of such debt outstanding reflected in the second column of this exhibit were taken from item 8(a) and 8(b) of Commission's Exhibit 25-A.

The details with respect to preferred and common stocks outstanding and the liquidation value of the preferred stock was obtained both from the balance sheet filed by the company for December 31, 1939 and from item 8(b) of Commission's Exhibit 25-A.

Q. There you have a footnote No. 2 with respect to some figures in the fourth column. Will you please explain that footnote and where you derived the information on which it is based? *A.* This footnote supports the segregation of amounts in the capital stock accounts as between various classes of preferred stock and common stock outstanding. The note is similar to that contained in Commission's Exhibit 25-A on the bottom of item 8(b) as note (e) prepared by the respondent.

Q. And the percentages computed in the last column were computed by you in the same manner as percentages previously discussed? *A.* They were.

[*116*] *Q.* Will you kindly turn to the second page of this exhibit? *A.* Yes.

Q. Now in general was all the information on this page derived from the source designated at the bottom of the page, the U5S statement of Electric Power and Light Corporation and the U5S statement of Electric Bond and Share Company? *A.* Generally that is true except the calculations on this page were not obtained from those records.

Q. And those calculations are percentage of total voting power and percentage of voting securities which were computed by you in the same arithmetical manner as described previously for other percentages? *A.* Yes.

Q. Now is the figure of 46.97 per cent shown at the bottom of the last column as the percentage of voting securities owned by Electric Bond and Share Company reflected in respondent's statement bearing Docket No. 30-139-2? *A.* That is the same percentage as reflected in Exhibit A of that docket.

Q. That is slightly different from the percentage shown by the respondent in its answer in this proceeding, is it? *A.* It is.

[*117*] *Q.* Do you know what that figure is, the figure shown in the answer filed by the respondent in this proceeding? *A.* I do not.

Q. But there was a minor variation? *A.* There was a fraction of a percent.

Q. I may say that figure shown in respondent's answer was 46.85 per cent, but the figure you have employed is reflected in the respondent's U5S statement? *A.* Yes.

Q. And your figures speak as of December 31, 1939 whereas respondent's answer speaks as of May, 1940? *A.* Yes.

Q. As in the case of the previous exhibit you have no knowledge as to the correctness of the sum set forth for earned surplus from the previous page of the exhibit? *A.* No, sir.

Mr. Berman: I ask this exhibit be received in evidence.

The Examiner: Cross examine.

Cross Examination (resumed) by Mr. MacLane.

XQ. This Exhibit 53 was prepared in the same manner with respect to Electric Power and Light Corpora-
[*118*] tion as Exhibit 51 was prepared with respect to Electric Bond and Share Company? *A.* Yes.

XQ. And the same remarks made with respect to the manner of preparation and the elements used in the combinations with respect to Exhibit 51 would apply to Ex-

hibit 53 if specific questions were directed to them? *A.* Yes.

XQ. Just to clarify the record could you tell me without difficulty whether the inclusion in your issued and outstanding stock, including that held in the treasury in column 2 of Exhibit 53 represents $103,109.33 of what I will call stated value of preferred stock? *A.* That is the figure. I am not sure whether it should be called stated value.

XQ. And some shares of common stock? *A.* Yes.

XQ. Just between us laymen stated value is close enough for our purposes here? *A.* I am not sure that it is.

XQ. Can you give it another name? *A.* I think Mr. Murphy might classify that a little differently.

XQ. All I am getting at is this difference in percentage. [*119*] Mr. Murphy suggests leaving out the dollars that you have included here in column 3 of page 1 of Exhibit 53, 973 shares of $7 preferred stock and 902 shares of common stock which the company shows among its assets on the balance sheet as reacquired capital stock. *A.* The suggestion is to leave out the dollar value of stocks issued in what amount?

XQ. No, I am not suggesting whether they should be left out or included. I am just saying you have included in your figures in the third column of page 1 of Exhibit 53 these shares of stock. *A.* That is correct.

XQ. And your resulting percentage of voting power exercised by Bond and Share of 46.97 is affected to some extent by that inclusion by a fraction?

Mr. Berman: That is, if you included that figure in the tabulation on the second page as well, or is it excluded in setting forth the voting power on the second page, Mr. Flanagan?

The Witness: It is included.

Mr. Berman: It is included?

The Witness: Yes.

Mr. Berman: That is you included the stocks held in the treasury? The treasury stock is included?

The Witness: That is right.

[120] Mr. Berman: In the total voting power?

The Witness: That is right.

XQ. (By Mr. MacLane): Now the only question I am interested in is whether if in its answer the Electric Bond and Share Company has excluded that stock in its computation of voting power, whether that would be responsible for the difference between the 46.85 per cent assigned in its answer in the percentage and the 46.97 per cent used by you? *A.* I am not sure.

XQ. It might be so, might it not? *A.* It might, yes.

XQ. It seems reasonable that difference in treatment might account for such a slight difference in percentage? *A.* It would just about,

Mr. MacLane: I have noted the same general objection. I don't object to the exhibit as not sufficiently identified. I object generally as to its materiality and relevance in the case.

The Examiner: Overruled and the document is admitted.

[The document referred to previously marked for identification Commission's Exhibit No. 53 is received in evidence.]

[121] *Direct Examination (resumed) by* Mr. Berman.

Q. Mr. Flanagan, I show you a tabulation marked as Commission's Exhibit No. 54 for identification and I ask you whether you have a copy of that before you? *A.* I have.

Q. Are you familiar with the contents of this tabulation? *A.* I am.

Q. And it was prepared under your general supervision and direction as were the others? *A.* It was.

Q. And will you state whether in general the informa-

tion set forth in the first four columns of this exhibit was derived from the sources stated at the bottom of the page, the U5S statement of National Power and Light Company, Commission's Docket 30-146-2-1, Exhibits 8 and 8-B? *A.* That is right.

Q. Do you know what the number of the Commission's exhibit is this document represents? *A.* Exhibit 32-A.

Q. And it was from that Commission's Exhibit 32-A the information set forth in the first four columns was derived? *A.* That is right.

[*122*] *Q.* With respect to the footnote appended at the bottom of the page, footnote 2, will you tell where you received the information as to that? *A.* That footnote is similar to the one contained in Commission's Exhibit 32-A at the bottom of item 8(b). It is given as note C on page 14 of this exhibit.

Q. Now the percentages of total capitalization were computed by you in the same mathematical manner discussed previously, were they? *A.* They were.

Q. Now with respect to earned surplus you do not know whether that exists or does not exist except as reflected in the statement of the company. Is that correct? *A.* That is right.

Q. Turning to the second page of that exhibit, Mr. Flanagan, will you state whether the sources of the information on which the figures in this exhibit are based were derived from were those stated at the bottom of that page? *A.* They were.

Q. Can you translate these document numbers for us in terms of Commission's Exhibits in this proceeding? *A.* 30-146-2-1 is Commission's Exhibit 32-A. Docket 30-139-2 is Commission's Exhibit 13.

Q. And it was from that source that you derived the information set forth on this page? [*123*] *A.* That is true.

Q. Except as to the computations of percentages and

those were derived by you in the same mathematical manner as the others described? *A.* They were, but they were also verified by Exhibit A filed in Docket 30-139.

Mr. Berman: I ask that that exhibit be received in evidence.

The Examiner: Cross examine.

Cross Examination (resumed) by Mr. MacLane.

XQ. This exhibit was prepared in the same manner and with the same assumptions with respect to the National Power and Light Company as Exhibit 51 with respect to Bond and Share? *A.* Yes.

XQ. And without repeating the same general comments as to the methods of preparation and mathematical combinations that may be made? *A.* Yes.

XQ. In this company, apparently, according to your exhibit, the preferred stock had no vote. Is that correct? *A.* That is correct.

XQ. So that voting power is distributed mathematically and proportionately to the common stock outstanding? [*124*] *A.* Yes.

XQ. That follows either with respect to the stock shown on page 2 as owned by Bond and Share as to the stock owned by others? *A.* That was a mathematical computation.

Mr. MacLane: Sufficiency of identification admitted. Objected to on the general ground of irrelevancy and immateriality directed to previous exhibits.

The Examiner: Objection overruled. It is admitted.

[The document referred to previously marked Commission's Exhibit No. 54 for identification is received in evidence.]

The Examiner: I will ask at this time, it is now 10:40 A. M., for the record if there is any person in the room who desires to be heard in this matter. [After a pause.] The

record will show there is no response. Have any communications been received by the Commission so far as you know, Mr. Berman?

Mr. Berman: Not as far as I know. I would like to state, Mr. Examiner, with respect to Exhibit 55 for identification, it was found that an error had crept in with respect to one figure. The change has been made and I should like permission to substitute a corrected page. I will show counsel a copy which has been corrected. Have I permission to have the corrected copy sub- [*125*] stituted, Mr. Examiner?

The Examiner: You may.

Direct Examination (resumed) by Mr. Berman.

Q. Mr. Flanagan, I show you a copy of a tabulation marked as Commission's Exhibit 55 for identification and I ask you whether you have a copy of this tabulation as revised before you? *A.* I have.

Q. And are you familiar with the contents of this tabulation? *A.* I am.

Q. It was prepared under your direction and supervision in the same manner as the others? *A.* It was.

Q. Will you tell us whether the information was derived from the sources stated at the bottom of that page, namely, from the U5S statement File No. 139? *A.* It was.

Q. Can you translate that file into terms of Commission exhibits in evidence in this proceeding? *A.* That is Commission's Exhibit 13.

Q. And all the figures shown there and the information on which the footnotes were based were derived from Commission's Exhibit 13 in evidence? [*126*] *A.* No, sir; there are two calculations at least that we have made.

Q. Will you explain, please, which those were? *A.* Item 9 of Docket 30-139 on page 14 lists the investments of Electric Bond and Share Company in its subsidiary

companies. On Exhibit 55 the data with relation to the investments of Electric Bond and Share Company in American Power and Light Company is exactly as shown on item 9 of Docket 30-139. The details of the investments in Electric Power and Light Corporation as to the description of the securities and the number of shares agrees with the data contained in item 9. The calculation of the value per books of the issuer applicable to these securities of Electric Power and Light Corporation has been made on the basis of note B at the bottom of page 14 of Commission's Exhibit 13 in this proceeding. $100 per share has been assigned to each class of preferred stock of Electric Power and Light Corporation owned and the value assigned to the common stock of Electric Power and Light Corporation was arrived at in this manner.

Q. And that is the information which is substantially reflected? *A.* I want to explain how I arrived at that.

Q. Yes, all right. *A.* Note B shows that on the basis explained in such note the value of the common stock of Electric Power [*127*] and Light Corporation would be $70,158,672.74. The common stock of Electric Power and Light Corporation owned by Electric Bond and Share represents 57.4 per cent of the total number of shares outstanding. This percentage has been compiled to the total value of the common stock and the resultant figure of $40,271,078 has been inserted in this Exhibit 55.

Q. As the value for the common stock? *A.* As the value per books of the issuer for its common stock owned by Electric Bond and Share Company.

Q. I see. *A.* A similar procedure was followed with respect to the value of the common stock of National Power and Light Company as calculated in the manner described in Note B of item 9.

In this case a percentage of 46.6 was compiled to the total value for the common stock reflected in Note B to

represent the portion of that value applicable to the common stock of National Power and Light Company owned by Electric Bond and Share Company.

Q. Are those the only computations that have been made on this exhibit, Mr. Flanagan? *A.* Yes. The figures reflected in the last column of Exhibit 55 agree with those shown in item 9 of Commission's Exhibit 13.

[*128*] *Q.* Except, as I understand it, you did total the last few figures above the total shown? *A.* That is right.

Mr. Berman: I ask that this be received in evidence, Mr. Examiner.

The Examiner: Cross examine.

Cross Examination (*resumed*) *by* Mr. MacLane.

XQ. Mr. Flanagan, the second column of your Exhibit 55 under the heading "Value per books of issuer," as I understand it uses the value of the capital stock of these different companies stated as a liability upon their balance sheet subject to computations you have made in segregating a value for the preferred from the total value where no segregation was made on the books as between preferred and common. Is that correct? A. That is right.

XQ. You didn't include, did you, in computing the value per books of issuer the value of reserves or surplus? *A.* No, sir.

XQ. If you were computing the book value of shares of stock in this or any other corporation, assuming a simple case like that of the average bank, for instance, in which there was nothing but common stock, you figure your book value per share according to the total assets after deducting liabilities other than capital, don't you? [*129*] *A.* Yes.

XQ. Would that be the really proper way to do it here? *A.* This is merely a compilation of figures either taken directly from the records submitted by the respondent or

calculated in accordance with the methods which they have also used.

Mr. Berman: May I interpose, Judge, just to clarify that. The question that Judge MacLane asked, it would be true, would it not, Mr. Flanagan, if one were seeking to arrive at book value in the sense of asset value of the stock of a corporation and one would divide it into the item "Assets" after subtracting liabilities. You didn't seek to do that?

The Witness: No, sir.

Mr. Berman: You were interested in that figure as per books of issuer with reference to value as per books of the issuer as stated in the capital account?

The Witness: That is correct.

Mr. Berman: It doesn't purport to be the book value in the asset sense?

The Witness: No, sir.

Mr. MacLane: Mr. Berman is anticipating my next question whether a truly descriptive title there would not be stated value of capital stock or something like that.

[*130*] In other words, doesn't your title, and I don't mean this was intentional —

The Witness: [interposing] No, sir.

XQ. (by Mr. MacLane): Doesn't your title connote something that your figures below your title really don't agree with? *A.* That title, Judge MacLane, is the one used in the U5S registration form. I merely copied it as recorded in that form.

XQ. Whoever is responsible for its use it really means, as I say, stated value of the capital in the capital account? *A.* That is what this column represents.

XQ. As distinguished from any calculation of book value per share? *A.* That is right.

Mr. MacLane: That is all, thank you. I have no objection to this exhibit, subject to the explanation which has heretofore been given.

The Examiner: It is admitted in evidence.

[The document previously marked Commission's Exhibit No. 55 for identification is received in evidence.]

[131] *Direct Examination (resumed) by* Mr. Berman.

Q. Mr. Flanagan, I show you a tabulation marked for identification as Commission's Exhibit 56, and I ask you whether you have before you a copy of this exhibit? *A.* I have.

Q. And are you familiar with the contents thereof? *A.* I am.

Q. Was it prepared under your direction and supervision and in the same manner as the other preceding exhibits? *A.* Yes.

Q. Will you state whether the information on which this tabulation is based and the figures contained therein were obtained from the sources indicated at the bottom of that page? *A.* They were.

Q. Will you please relate the sources stated at the bottom of that page to the exhibit number in this record? Can you do that for us? *A.* This is Commission's Exhibit 13.

Q. Commission's Exhibit No. 13? *A.* 13.

Q. Do you have any more specific reference in the U5S form for the page reference for that docket? [132] *A.* Yes. These figures were taken from item 9, page 14 of Commission's Exhibit 13.

Q. Item 9? *A.* Page 14.

Mr. Berman: Excuse me, Judge MacLane, did you get that? Mr. Flanagan has stated that the information was derived from Docket 30-139, item 9, page 14. That is Commission's Exhibit 13.

Mr. MacLane: Exhibit 13.

Mr. Berman: But he is giving you the page reference.

Mr. MacLane: Thank you.

Q. (by Mr. Berman): And the figures shown on this page were derived from that source, Mr. Flanagan? A. They were.

Mr. Berman: I ask it be received, Mr. Examiner.

The Examiner: Cross examine.

Cross Examination (resumed) by Mr. MacLane.

XQ. Just a few questions to make this clear. Your first column on this Exhibit 56 is what you call ledger value on books of Bond and Share? *A.* Yes.

XQ. And your second column, taking a specific illustration, 51,840 shares of preferred stock of American Power [133] and Light Company was carried on the books of Bond and Share at $1,556,237? *A.* Yes.

XQ. And your second column shows $532,000 there as cost to the system company originally acquiring the security means that some other company in the Electric Bond and Share system had originally at some time acquired equivalent assets which were converted into these shares of preferred stock in American Power and Light? A. I am not well enough acquainted with it to say yes to your entire statement, Judge MacLane.

XQ. (by Mr. Berman): Is your difficulty, Mr. Flanagan, it need not have been some other company? It might have been Electric Bond and Share. I mean whichever company in the system first acquired it, it might have been Electric Bond and Share. That was the cost to it, $532,000. Is that it? A. That is one difficulty and the other is Judge MacLane's term "equivalent assets."

XQ. I didn't hear that. *A.* I also have difficulty with Judge MacLane's term "equivalent assets."

Mr. Berman: I see.

XQ. (by Mr. MacLane): Well I merely wanted to get this clear, by [134] cost to system company you mean cost of these assets. I will forget the word "equivalent." *A.* Yes.

XQ. Although I think it was equivalent in some cases. You mean cost of these assets to some other company either to the Electric Bond and Share Company or some other company in the Electric Bond and Share Company system? *A.* That is what I mean, yes.

XQ. And that cost shown in the second column might have been a day, a year, five years or ten years or twenty years for that matter prior to the later acquisition and entry upon the books of Electric Bond and Share Company of the figures shown in the first column? *A.* It might have been, yes.

XQ. The time element is not taken into consideration? *A.* No, sir.

XQ. Furthermore it might not have been the Electric Bond and Share Company but may have been some other holding company or even some operating company?

Mr. Berman: Of the Bond and Share system.

XQ. (by Mr. MacLane): Of the Bond and Share system. *A.* That is right.

[*135*] *XQ.* You embrace in your description of the Bond and Share system in this second column — specifically does it include American Gas and Electric Company and its subsidiaries as a part of such system? *A.* These are figures reported by the respondent. What they have included I am not familiar with.

XQ. Are the particular transactions reflected in the statements from which you compiled these figures? *A.* These are figures specifically included in item 9 of Electric Bond and Share U5S registration statement.

XQ. I don't know much about the U5S statement. That doesn't mean a great deal to me, but I assume, and you may tell me whether I am correct or not, that if these figures are correct as stated in the U5S statement in some sort of summary statement that the supporting detail was included in some schedule or statement in the U5S state-

ment. *A.* I don't think these figures are supported by any other schedule in the U5S statement.

XQ. (by Mr. Berman): Am I correct, Mr. Flanagan, in stating this information is set forth in the form you have given it, that is, it represents the cost to the system company originally acquiring the security without any explanation of the transactions involved, and you have merely copied those [*136*] figures? *A.* I would like to refer to the docket to make sure there is no text explanation of this item before I answer.

The Examiner: We will take five minutes recess at this time.

[Short recess.]

[*137*] The Examiner: Proceed, gentlemen.

Mr. Berman: You had asked a question Judge MacLane, as to whether the transactions which accounted for the difference between the cost to the System Company originally acquiring and the carrying value to Electric Bond & Share Company would be found reflected in the statement filed by the respondents. Have you inquired into that, Mr. Flanagan, and discovered any information on that subject?

The Witness: Yes, sir, I find that Docket 30-139, which is Commission's Exhibit No. 11 in these proceedings, contains a supplement to Exhibit D, which contains lengthy explanations dealing with revaluations. It appears that some of these items at least have explanations in this amendment, but I have not checked it through in detail to see to what extent they are explained.

Mr. MacLane: Then I won't take the time to do that at this time, but as I understand, we may develop from the exhibits already introduced the detail of these transactions which resulted in discrepancies or differences between carrying value in the first column and cost to the System Company in the second column.

Mr. Berman: That file is in evidence and to the extent

that it contains information, that information is [138] available to us. Is that correct, Mr. Flanagan?

The Witness: That is correct.

Mr. Berman: May I state, Mr. Examiner, that that is one of the benefits of having a statement like the U5S in evidence because of the historical data it contains, which bears on these matters. That is in reference to our conversation yesterday.

Mr. MacLane: No other objections. I would like to interpose the same objection of absence of relevancy and materiality to the issues in this proceeding.

The Examiner: In getting these figures you used practically the same titles or descriptions in your document that were found in the source material?

The Witness: Yes, sir.

The Examiner: The objection is overruled. Admitted.

[The document referred to was thereupon received in evidence as Commission's Exhibit No. 56]

Mr. MacLane: I would like to take the liberty of referring to Mr. Berman's last remark as to what is in and what is not in these exhibits. The great difficulty I find is that neither side knows what is in them and it rather emphasizes the position I took earlier in the hearing that at some stage in the case we should know what the other fellow relies on.

[139] Mr. Berman: I would like to note that it was Mr. Murphy who pointed out the information in that statement. He at least knows, if nobody else does.

The Examiner: I have been wondering whether or not it would be possible before this hearing is concluded, so far as the Commission's case, is concerned, for Commission's counsel to state for the record those portions of these exhibits that are material and by reference to particular item numbers, sections or exhibits, some of it might be eliminated in that way.

Mr. Berman: May we reserve further discussion on this

until the completion of the other portion of the evidence and then I take it this will all become germane?

The Examiner: The reason I make the suggestion now is that you might have some of your assistants or colleagues perhaps doing work along that line in the mean time.

Mr. Berman: For reasons I shall explain when our discussion takes place later, that can not be done, Mr. Examiner. May I proceed at this point?

The Examiner: Yes.

Direct Examination (resumed) by Mr. Berman.

Q. Mr. Flanagan, I show you a document marked for [*140*] identification as Commission's Exhibit 57. I ask you whether you have a copy of that exhibit before you? *A.* I have.

Q. And are you familiar with the contents thereof? *A.* Yes, sir.

Q. Was it prepared under your general supervision and direction in the same manner as the other exhibits? *A.* Yes, sir.

Q. Will you tell us whether the information and figures set forth in this tabulation were derived from the source stated at the bottom of the sheet? *A.* Yes, and as further identification of the source —

Q. May I interrupt, Mr. Flanagan? Will you kindly identify to us by relating to the exhibits in evidence, File 30-139? *A.* This is Commission's Exhibit 13.

Q. Commission's Exhibit 13 in evidence. Thank you, Mr. Flanagan. Will you explain where else you derived this information? *A.* The investments listed in Exhibit 57 were taken from Item 9 of Commission's Exhibit No. 13. That statement must be amplified to this extent: That I have added to the investments in United Gas Corporation, [*141*] an unsecured demand note of 6 per cent in the principal

amount of $25,925,000, and an account payable by United Gas Corporation to Electric Bond & Share Company in the amount of $3,000,000. In all other respects these figures appear in Item 9 of Commission's Exhibit 13.

Q. Where did you derive the figures to which you just referred, Mr. Flanagan? *A.* The balance sheet of Electric Bond and Share Company as at December 31, 1939, reflects an item under investment securities and advances, as follows: "United Gas Corporation, $28,925,000."

Q. And that balance sheet is in evidence as Commission's Exhibit No. 13? *A.* It is.

Q. Very well, sir.

Mr. Berman: I ask that that exhibit be received in evidence, Mr. Examiner.

The Examiner: Cross examination?

Cross examination (resumed) by Mr. McLane.

XQ. Just as in the case of the preceding Exhibit No. 56, the carrying value to Electric Bond and Share Company shown in the last column represents the ledger value or cost to Electric Bond and Share at the time of acquisition [*142*] by Electric Bond and Share, subject to any adjustments which might have been made in any case since? *A.* To be more specific, Judge MacLane, they represent the values reported to this Commission as those carried on the books of Electric Bond and Share Company for each investment listed in this Exhibit 57.

XQ. To make my question a little more simple, they represent ledger values as shown on the books of Electric Bond and Share Company, regardless of the time of entry, they show what is presently carried on the books? *A.* Ledger values as at December 31, 1939.

XQ. And the value per books of issuer represents the stated value of the securities as a liability of the issuer at the time of issue? *A.* Not necessarily, sir.

XQ. Well, that would be true unless there was some restatement of that capital liability at some subsequent time, wouldn't it? *A.* That might be true. What the figures reflected here represent is the value per books of issuer reported to us in Item 9, Commission's Exhibit 13. What adjustments may have been made in there from the time of acquisition, I have no knowledge of.

XQ. Take as a simple illustration the first page. [*143*] There is no relationship between the time of the entry upon the books of the Florida Power & Light Company as a liability of $417,000 face value of its bonds at $417,000, and the time that those bonds were acquired by the Electric Bond and Share Company and the price paid by the Electric Bond and Share when it acquired the bonds? A. Generally speaking I would say no, but they may have been issued and acquired simultaneously. Of that I have no knowledge.

XQ. All I am getting at, Mr. Flanagan, is that there is no essential relationship in time between the liability transaction reflected on the books of the issuing company and the carrying value to Bond and Share as reflected on its books. *A.* Not necessarily, no, sir.

XQ. Just a hasty inspection of this exhibit, and I have not analyzed it, would indicate that the excess of carrying value to Bond and Share shown in the last column, over the value per books of issuer, is represented by the item "Common Stock and Option Warrants of United Gas Corporation" shown about four or five lines from the bottom. Is that a fair statement?

Mr. Berman: Might I ask that that question be read?

The Examiner: Read the question.

[The last question was thereupon read by the reporter.]

[*144*] The Witness: Yes, it is.

XQ. (by Mr. MacLane): Do you happen to know, or do you know, that there is a very radical write-down of the stated values of the common stocks of United Gas Corporation on that company's books?

Mr. Berman: Answer only if you know, Mr. Flanagan.

Mr. MacLane: That is all I asked him.

The Witness: Not definitely, Judge MacLane.

XQ. (by Mr. MacLane): Consequently, you could not say whether this carrying value Bond and Share represented in the last column of the common stocks and option warrants of United Gas corresponds or does not correspond with the original liability value, if I use correct term, stated on the books of United Gas Corporation at the time of the original issue of that stock? *A.* No, sir.

XQ. One other question with respect to such items of stocks, and I believe that is the only one. The same question that I asked with respect to one of the earlier exhibits might be raised here, might it not, as to whether this value per books represents anything other [*145*] than the stated liability value of the common stock ex surplus and reserves? *A.* That is so. This might more properly be stated as the value of the securities reflected in the capital stock account where such items listed are stocks.

XQ. That being the only item of stock, I suppose that that is the only item here to which that remark would be applicable? *A.* That is true.

Mr. MacLane: Just a general objection that the exhibit is not relevant or material to any issue in the proceeding.

The Examiner: Objection overruled. Received.

[The document referred to was thereupon received in evidence as Commission's Exhibit No. 57.]

Direct Examination (resumed) by Mr. Berman.

Q. Mr. Flanagan, I show you a tabulation consisting of two sheets marked for identification as Commission's Ex-

hibit No. 58, and I ask you whether you have before you a copy of this tabulation? *A.* I have.

Q. Are you familiar with the contents thereof? *A.* Yes, sir.

Q. Was it prepared under your general direction and supervision in the same manner as the other exhibits [*146*] previously introduced? *A.* Yes, sir.

Q. Will you tell us whether the information and the figures on which this tabulation is made, and of which it is comprised, were derived from the source stated at the bottom of the second page? *A.* They were.

Q. And will you relate that docket number to the exhibits in evidence in this proceeding? A. That is Commission's Exhibit 18 (a).

Q. 18 (a)? *A.* Yes, sir.

Q. Can you more precisely identify in that file the pages or otherwise sources from which the information was derived? *A.* These details were obtained from Item 9, page 19 of Commission's Exhibit 18 (a).

Q. And all the information shown in this tabulation came from that source, Mr. Flanagan? *A.* It did.

Mr. Berman: I ask that it be received in evidence, Mr. Examiner.

The Examiner: Cross examine.

[*147*] *Cross Examination (resumed) by* Mr. MacLane.

XQ. This is the same type of exhibit with reference to American Power and Light Company investments as Exhibit 57 was with respect to Electric Power and Light Company investments? A. Yes, sir.

XQ. Except that it includes the investments of American Power and Light in its direct subsidiaries, including their stocks, whereas No. 57 included for the Bond and Share only its investments in the subsidiaries of the holding companies? *A.* That is right.

XQ. Now, so far as the stocks are concerned, the same question would be asked and I assume the same answer would be returned, as to the second column, "Value Per Books of Issuer".

It represents the stated liability value of the stock as a segregated liability, and not any calculation of book value of the stock resulting from an analysis of the entire balance sheet? *A.* That is so, yes, sir.

XQ. And it excludes the items of surplus reserves or anything of that kind? *A.* Yes, sir.

[*148*] *XQ.* Now, there is not necessarily a time relationship between the value placed on these liabilities by the issuer at the time of the issue, and the time the American Power and Light Company took them over and entered the so-called carrying value on its books as an asset? A. No, sir.

XQ. They might have been contemporaneous or might have been widely separated in time? *A.* Yes, sir.

XQ. Just for illustration, if you go about half way down page 1 you find the item "Montana Power Company, common stock, $49,000,000," on the books of the issuer, and $98,000,000 on the books of American Power and Light Company. Do you or do you not know, as a fact, that the Montana Power stock was issued many years prior to its acquisition by American Power and Light? *A.* I understand that to be a fact, yes, sir.

XQ. And do you or do you not know that the $98,917,000 entered as carrying value to American Power and Light was actually paid in stated value of securities issued by American Power and Light for that stock? A. Not specifically. I would not answer yes to that question, sir.

XQ. You don't know that that is not the case? [*149*] A. I do not.

XQ. Summarizing the whole thing as shown by your total, the total carrying value to American Power and

Light of all these securities on subs is $248,949,560.73, to be accurate, and the value on the books of the issuers is about $9,000,000 in excess of that, or $247,085,610.85. Is that correct? *A.* That is right.

XQ. One purely technical question. I suppose your heading should be "Carrying Value," instead of "Company Value," should it not? A. Yes, sir.

Mr. MacLane: It may be corrected if you wish, Mr. Berman.

Mr. Berman: Thank you.

XQ. (by Mr. MacLane): I would like to ask just one more question. In the event there was in any case a restatement of the item "Value per books of issuer" on the books of the issuing company, the effect of that restatement would be included in this column, "Value per books of issuer," would it not? *A.* I understand so, yes, sir.

XQ. And similarly, if there was at any time a restatement of ledger values on the books of American, that would be reflected here because this is as of December 31, [*150*] 1939? *A.* Yes, sir.

XQ. It does take into effect or reflect any changes made on the books of either company subsequent to the original transaction? *A.* I understand it does, yes, sir.

XQ. A current statement as of December 31, 1939, and not in any sense a historical statement? *A.* Yes, sir.

Mr. MacLane: Just for the record, the general objection of irrelevance and immateriality.

The Examiner: Overruled; admitted.

[The document referred to was thereupon received in evidence as Commission's Exhibit No. 58.]

Direct Examination (resumed) by Mr. BERMAN.

Q. Mr. Flanagan, I show you a copy of the tabulation marked Commission's Exhibit 59 for identification, and I ask you if you have before you a copy of this tabulation? *A.* I have.

Q. And are you generally familiar with the contents thereof? *A.* Yes, sir.

Q. And was it prepared under your supervision and direction the same as the exhibits previously introduced? [*151*] *A.* Yes, sir.

Q. Can you tell us whether or not the figures set forth on this exhibit were derived from the source indicated at the bottom of the page? *A.* They were.

Q. And will you relate that file number to the exhibits in evidence in this proceeding? *A.* That is Commission's Exhibit 25 (a).

Q. And can you identify with greater particularity the part of the file in which these figures are to be found? *A.* These figures can be found in Item 9, page 26 of Commission's Exhibit 25 (a).

Q. And all the figures on this page and the information contained in the footnote, were derived from that source? *A.* They were.

Mr. Berman: I ask that it be received in evidence, Mr. Examiner.

The Examiner: Cross examine.

Cross Examination by Mr. MacLane.

XQ. This is the same type of exhibit as to Electric Power and Light Corporation, as No. 58 was with respect to American Power and Light Company? *A.* Yes, sir.

XQ. Prepared in the same manner and subject to the [*152*] same observations that were discussed between us with respect to American Power and Light? *A.* Yes, sir.

XQ. A summary of this exhibit is shown by the figures at the foot, or perhaps I should say a totalization of those figures indicates that the carrying value to Electric Power and Light Corporation of these securities is approximately $15,000,000 less than the value assigned to them on the books of the issuing companies? *A.* Yes, sir.

Mr. MacLane: The same general objection, that the exhibit is not relevant or material to any issue in this case.

The Examiner: Objection overruled. Admitted.

[The document referred to was thereupon received in evidence as Commission's Exhibit No. 59.]

Mr. Berman: Off the record.

[Discussion off the record.]

Direct Examination (resumed) by Mr. BERMAN.

Q. Mr. Flanagan, I show you a tabulation marked for identification as Commission's Exhibit No. 60, and I ask whether you have before you a copy of that document? *A.* I have.

Q. And are you familiar with the contents thereof? [153] *A.* Yes, sir.

Q. And was it prepared under your direction and supervision in the same manner as the other exhibits previously introduced? *A.* It was.

Q. Will you state whether the source from which the figures and information used in this exhibit were derived, is that stated at the bottom of the page? *A.* It is.

Q. Will you relate that source to the exhibit in evidence in this proceeding? *A.* That is Commission's Exhibit 32(a).

Q. And were all the figures shown here derived from that source? *A.* They were.

Q. Including the information stated in the footnote? *A.* Yes, sir.

Mr. Berman: I ask that it be received, Mr. Examiner.

The Examiner: Cross examine.

Cross Examination (resumed) by Mr. MACLANE.

XQ. This is a similar exhibit for National Power & Light Company investments as Exhibit 58 for American Power & Light and Exhibit 59 for Electric Power & Light? [154] *A.* Yes, sir.

XQ. Prepared in the same manner and subject to the same observations as to the various figures shown? *A.* Yes, sir.

Mr. MacLane: The same general objection. It is irrelevant and immaterial to any issue in the case.

The Examiner: The same ruling. Admitted.

[The document referred to was received in evidence as Commission's Exhibit No. 60.]

Direct Examination (resumed) by Mr. BERMAN.

Q. I show you, Mr. Flanagan, tabulation marked for identification as Commission's Exhibit No. 61, and ask you if you have before you a copy of that tabulation? *A.* I have.

Q. Are you familiar with the contents thereof? A. Yes, sir.

Q. Was it prepared under your supervision and direction in the same manner as the exhibits previously introduced? *A.* Yes, sir.

Q. Will you state whether the source set forth at the bottom of the page is the source from which you derived the information on which these figures were based? *A.* Yes, sir.

[*155*] *Q.* Is that source the annual reports in evidence in this proceeding? *A.* There are several reports. I will give the reference data—

Q. They are in evidence as part of the U5S statements of the various respondents for 1939? *A.* Yes, sir.

Q. And were all the figures shown on this tabulation taken from the sources indicated? *A.* They were.

Q. Referring to the second column from the left, headed "American Power & Light Company," will you take the figures in order, starting from the first one and going down the line, and explain to us what these figures represent? *A.* The balance sheet contained in the annual report of Ameri-

can Power & Light Company for the year 1939 reflects under "Capital stocks" preferred stocks of American Power and Light Company issued in the aggregate amount of $177,145,326, and common stock in the stated amount of $37,434,351. Immediately below those figures is shown an item of preferred stocks issued by subsidiaries in the amount of $111,622,200. Below this item is listed a common stock issue of subsidiaries in the stated amount of $425,076.29. [156] This same consolidated balance sheet reflects outstanding long-term debt of American Power & Light Company in the aggregate amount of $46,299,000, and of subsidiaries in the aggregate amount of $312,995,000. The total at the bottom of this column is a simple mathematical calculation, adding together the capital stocks and long-term debt outstanding as reflected above.

Q. And the figures set forth in the columns headed "Electric Power & Light Corporation," and "National Power & Light Company," were similarly derived and represent the same method of computation? *A.* That is right.

Q. And the final column is a mere totaling of the figures horizontally across the page? *A.* Yes, sir.

Mr. Cohen: Mr. Flanagan, do the figures of securities outstanding include securities held by Electric Bond and Share Company?

The Witness: Yes, sir.

Q. (by Mr. Berman): Are there any other statements you wish to make with respect to this tabulation, Mr. Flanagan, or do you feel you have explained how it was derived? *A.* There is nothing further that I have to add.

Mr. Berman: I ask that it be admitted, Mr. Examiner.

[157] The Examiner: Cross examine.

Mr. MacLane: What are the exhibits?

Mr. Cohen: 18(a), 35 (a), and 32 (a).

Mr. MacLane: No cross examination and no objection.

The Examiner: Admitted.

[The document referred to was thereupon received in evidence as Commission's Exhibit No. 61.]

Mr. MacLane: Now, if the Examiner please, and gentlemen for the Commission, I would be perfectly willing to agree that you make an omnibus offer of Exhibits 62 to 66, inclusive, and simply state what they are and I will agree that they may be admitted subject to any check of the figures, and subject also to a very definite objection that these exhibits and each of them are not relevant or material to any issue in this case. I suppose it is premature for me to state that objection more fully until you have identified them, but I am willing to make that stipulation if it will save any time and be of any convenience.

Mr. Berman: I take it, Mr. Examiner, that an objection to materiality and relevance will always be in order to any of these exhibits so far as the respondents are concerned. I wish to state that Exhibit 62 is a tabulation showing expense of Electric Bond and Share Company for the twelve months period ending December 31, 1939; Exhibit 63 is a [*158*] statement of expenses of American Power & Light Company for the 12 months ended December 31, 1939; Exhibit 64 is a statement of the expenses for the 12 months ended December 31, 1939, of Electric Power & Light Corporation; and Exhibit 65 is a statement of the expenses of National Power & Light Company for the 12 months ended December 31, 1939; and Exhibit 66 is a statement of expenses of Ebasco Services, Inc., for the twelve months ended December 31, 1939.

Direct Examination (resumed) by Mr. Berman.

Q. Will you state, Mr. Flanagan, in general, the source of the information on which these various exhibits are based? *A.* Each of the exhibits, 62 to 65, inclusive, was

obtained from Form U14-3 filed by the company for which the exhibit has been prepared.

Q. All of which are in evidence in this proceeding? *A.* All of which are in evidence in this proceeding. Commission's Exhibit 66 was prepared from data contained in Form U-13-60, filed with this Commission by Ebasco Services, Inc., which form is an exhibit in this proceeding.

Q. Now, do I understand correctly, Mr. Flanagan, that these tabulations purport to set forth all the expenses of these companies with the sole exception of expenses of servicing their respective bond issues or debts, [*159*] to the extent if they have any outstanding? *A.* So I understand.

Q. That item is not included herein? *A.* That is right.

Mr. Berman: Will they be received at this time, Mr. Examiner?

Mr. MacLane: I would like to enter the objection of respondents to Exhibits 62 to 66, inclusive, and each of them, on the ground that they are neither material nor relevant to any issue in this case.

I don't propose to take up the time with argument, and I don't care whether these things are in the files of this case or not—they are all in these other files—but the point of my objection specifically is that it seems to me these exhibits interject an element into this case which should not be here, and which if it is to remain in the case as an element, may involve us in a good deal of testimony and a good deal of time before we get through.

The Examiner: What do you refer to, Judge?

Mr. MacLane: I refer simply to this: We are here in response to a notice and order which initiates an inquiry into the single question of whether the corporate structure of three named companies, as they remain at this time designated, unduly complicates the structure, or unfairly distributes the voting power of the holding company

system. [160] Now, if these exhibits are laying the foundation for any claim on the part of counsel for the Commission that the existence of some one of these companies involves or creates an unnecessary expense to the system, then it seems to me we are adding something that is not in the statute and, while that may not be very important because presumably the Examiner in his report and the Commission will eventually disregard it, it is casting upon us a burden which should not be cast upon us, namely that of justifying the expenses.

The Examiner: What do you say to that, Mr. Berman?

Mr. Berman: Mr. Examiner, I want to say that these exhibits bear directly on the issue to which this proceeding was initially confined, namely, whether it is necessary to discontinue the existence of American Power & Light Corporation, Electric Power & Light Corporation, and National Power & Light Company in order that the structure of Electric Bond & Share Company's system be not unduly and unnecessarily complicated, and voting power unfairly and inequitably distributed among security holders of the holding company system. One of the questions necessarily is: Do these companies constitute an undue and unnecessary complication to the structure of Electric Bond & Share System.

The Examiner: What do you contend constitutes complication?

[161] Mr. Berman: What do we contend constitutes competition?

The Examiner: Yes.

Mr. Berman: We contend a number of things which we will explain in greater detail later, but bearing on this issue we wish to say that it is quite apparent to us that the expense to the security holders of these various companies, measured by the services that they perform for these

security holders, certainly has some bearing on whether they are undue or unnecessary complication. Now, the existence of any company over and above a certain number of other companies is obviously some sort of a complication, but that still does not deal with the problem of whether it is undue or unnecessary.

The Examiner: The meaning of "complication" is not defined in the statute, is it?

Mr. Berman: No, sir, except so far as is indicated in the statement of Policy of the Act contained in Section 1-C, and so far as I know there has been no holding on this point and it appears to us that certainly it must bear on the issue of undue and unnecessary complication for the Commission to have before it the evidence of what these companies do as measured by what these companies cost the security holders, and that would furnish some basis for the Commission to say, "These appear to us to be an undue and [*162*] probably an unnecessary complication," which I am not saying at this time is so, but I say that certainly these tabulations or exhibits are relevant on that issue.

The Examiner: Of course, complication is obviously a more or less general term and covers a lot of territory.

It may well be that a situation that will cause unnecessary expense might be construed by the Commission as one of the elements that would constitute a complicated situation. Inasmuch as that has not been decided, I think that I will have to take the evidence at the present time and overrule the objection.

[The documents referred to were thereupon received in evidence as Commission's Exhibits Nos. 62 to 66, inclusive.]

Direct Examination (resumed) by Mr. Berman.

Q. Mr. Flanagan, I show you a copy of a tabulation marked for identification as Commission's Exhibit 67.

Have you a copy of this tabulation before you? *A.* Yes, sir.

Q. Are you familiar with the contents of this exhibit, Mr. Flanagan? *A.* I am.

Q. Was it prepared under your supervision and direction in the same manner as those exhibits previously re-
[*163*] ceived? *A.* Yes, sir.

Q. And was the source of the information and figures set forth in this tabulation, that which is indicated at the bottom of the page? *A.* Yes, sir.

Q. And can you relate the stockholders' reports and the file numbers set forth therein to the exhibits in evidence in this proceeding? *A.* The annual report to stockholders for the year 1939 prepared by American Power & Light Company is the company's Exhibit F, Part One, contained in Docket 30-144, which is Commission's Exhibit 18 (a). The annual report for the year 1939 prepared by Electric Power & Light Company is Company's Exhibit F, Part Four, contained in Docket 30-143, which is Commission's Exhibit 25(a).

Q. And were all the figures set forth in this tabulation derived from those sources? *A.* No, sir; some of them were calculated.

Q. Before we go into the question of calculation, was not one of your sources the U5S filed by Electric Bond and Share Company? *A.* That is right. That is Commission's Exhibit 13.

Q. In evidence in this proceeding? [*164*] *A.* In evidence in this proceeding, yes, sir.

Q. Now, will you explain to us, Mr. Flanagan, just what computations you have made based upon figures derived from those statements and exhibits? *A.* The arrearages per share indicated in the first column, the total number of shares outstanding, and the total arrearages set down in

the last two columns of this statement, are taken from the annual reports of American Power & Light Company and Electric Power & Light Corporation, which were just identified. The number of shares of preferred stock of these two companies headed by Electric Bond & Share Company, were taken from Item 9 of Commission's Exhibit 13. The calculations are contained in the arrearages set down as applicable to those shares held by the public, and to those shares held by Electric Bond and Share Company. The calculation consisted of subtracting from the total number of shares outstanding those held by Electric Bond & Share Company, to arrive at the number of shares held by the public, and applying to each of these figures the arrearages per share indicated in the first column of this statement.

Q. And that shows that on the securities held by the public, arrearages amounting to $72,519,039.80 exist, that being the figure on the right hand? [*165*] *A.* No, that figure applies to the total shares outstanding, including those held by the public and by Electric Bond and Share Company.

Q. But the arrearages on the shares held by Electric Bond and Share Company amount to $1,624,317? *A.* That is right.

Q. And on those held by the public they amount to $70,894,722.71? *A.* Yes, sir.

Q. Making the total arrearage of $72,519,039.80 which I previously stated? *A.* That is right.

Mr. Berman: I ask that this exhibit be received, Mr. Examiner.

The Examiner: Cross examine.

Cross Examination by Mr. MacLane.

Q. The arrearages on the stock held by Bond & Share are at the same rate per share as the arrearages to the public per share on the same classes of shares? *A.* Yes, sir.

Mr. MacLane: The general objection to the exhibit as irrelevant and immaterial to any issue in the case.

The Examiner: Overruled.

[*166*] [The document referred to was thereupon received in evidence as Commission's Exhibit No. 67.]

Mr. Berman: Mr. Examiner, I understand that that concludes the introduction of the documents marked for identification at yesterday's session and, therefore, I ask that Mr. Flanagan be excused.

The Examiner: Very well.

[Witness excused.]

Mr. Berman: I understand, Mr. Examiner, that this Docket 37-31-1 was not present in the room yesterday when the other dockets which were part of this exhibit were introduced, and I ask to have it received at this time.

The Examiner: Very well; it is so received.

[The document referred to was thereupon received in evidence as Commission's Exhibit No. 38-K.]

Mr. Berman: Due to the fact that we wish to discuss with counsel for the respondents the question of a stipulation of facts, I suggest that you permit us to recess now for the lunch hour in order that we may have lunch and have this discussion as well.

The Examiner: We will recess at this time until 2 o'clock. All interested parties will return at that time.

[Whereupon, at 12:15 o'clock P.M., a recess was taken until 2 o'clock P.M., of the same day.]

[*167*] AFTER RECESS

[The hearing was resumed at 2:40 o'clock P.M., pursuant to recess.]

The Examiner: Are you ready to proceed, gentlemen?

Mr. Berman: We are, Mr. Examiner.

The Examiner: Very well.

Mr. Berman: Mr. Examiner, the parties, that is coun-

sel for the Securities and Exchange Commission and counsel for the respondents in this proceedings have agreed upon a stipulation which we would like to have read into the record if we may.

The Examiner: Very well.

Mr. Berman: It reads as follows:

"For the purposes of this proceeding only, and without prejudice to any other proceeding before this Commission or elsewhere, the facts stipulated to in the stipulation of facts the exhibits annexed thereto, entered into between the Securities and Exchange Commission and the present respondents, among others, and filed in the United States District Court for the Southern District of New York in the case of Securities and Exchange Commission, Plaintiff, versus Electric Bond and Share Company, et al, defendants, in Equity No. E81-378, shall be taken prima facie as facts existing as of the date of said prior stipulation, viz., June 30, 1936, with like force and effect as though [168] presented by competent witnesses and received in evidence in this proceeding. The aforesaid stipulation of facts shall not be physically attached to or copied into the transcript of the record of the present proceeding, but it shall be deemed incorporated into the record of this proceeding, and shall be given exhibit numbers as follows:"

The Examiner: Incorporated by reference?

Mr. Berman: By reference.

"Volume II to bear Commission's Exhibit 68-A.
Volume III, Commission's Exhibit 68-B.
Volume IV, Commission's Exhibit 68-C.
Volume V, Commission's Exhibit 68-D.
Volume VI, Commission's Exhibit 68-E.
Volume VII, Commission's Exhibit 68-F.

"Neither counsel for the Securities and Exchange Commission nor counsel for the respondents by entering into this stipulation shall be deemed to have conceded the relevancy or materiality of any facts contained in the aforesaid stipulation; the right to object at any appropriate time to the relevance or materiality of any statements therein contained being expressly reserved by both sides.

"Neither counsel for the Securities and Exchange Commission nor counsel for the respondents shall be foreclosed from offering evidence which is material and relevant and which seeks to amplify, modify, contradict or cor- [*169*] roborate statements contained in the aforesaid stipulation of facts and related exhibits, but any such evidence shall not prevail unless it overcomes the prima facie case established by the stipulation.

"In the event of any appeal from any order of the Commission in connection with the present proceeding, or any court proceeding of any kind in connection therewith, there may be omitted from the record such portions of the aforesaid stipulation (Commission's Exhibits 68-A to F inclusive) as may be determined by the parties to be immaterial; in the event of their disagreement, the determination to be made by the Trial Examiner in the present proceeding, subject to the right of either party to print at its own expense any rejected portions, which shall be joined to the record as an offer of proof on the part of the party submitting it."

The Examiner: Do you agree to that?

Mr. MacLane: We agree to that stipulation. I stated to counsel when I expressed my agreement that at the close of the Commission's case, as I understood it, and as I have

said heretofore, I expect to make some motion for definition of issues. I don't intend to state the exact form of the motion at this time, and by entering into this stipulation I want to be sure the record discloses I don't waive my right to such motion.

The Examiner: I started to say there is only one [*170*] thing that strikes me as anomalous in the content of the stipulation and that is that there is a reservation to object to immateriality or irrelevancy of all the material which is deemed to indicate that you are offering something which neither side considers material. It puts me in the position of accepting evidence without any basis of materiality.

Mr. Berman: Mr. Examiner, that doesn't seem to me to be an insuperable difficulty. I think both sides feel it is in general background material and therefore that this stipulation is material, but that doesn't mean every single part of it and every single document in it is material.

The Examiner: Maybe you do contend certain portions are material?

Mr. Berman: We would not have it entered in the record if we didn't feel it had some materiality or relevancy in this proceeding. I think we all agree it does. What portions are immaterial we reserve the right to raise the objection as we go along.

The Examiner: I think that clarifies the situation. All right, proceed.

Mr. Berman: Let the record show, Mr. Examiner, that counsel for the Commission likewise stipulates. I offer as Commission's Exhibit No. 69 and ask that it be received subject to the reservations as to materiality and [*171*] relevancy, and that it be incorporated by reference in the record and not physically the pleadings of the parties in the case of the Securities and Exchange Commission, Plaintiff, against Electric Bond and Share Company, et al, Defendants, for the limited purpose of establishing admis-

sions of the respondents in this case with respect to the material issues in this case, and no doubt for such admissions as the respondents may find are established by the pleadings of the Securities and Exchange Commission in that proceeding subject, as I have said, to the right of either party to object to the materiality of any portion of this document.

The Examiner: Is that agreeable.

Mr. MacLane: Why I think so, assuming we have a full and complete right of objecting on the grounds of immateriality. I don't want to object on the grounds of lack of identification, that it is a copy and not the original, or any technical ground, and I admit the principle if there is an admission against interest in a judicial pleading it has a strong effect and is almost insuperable. Offhand I don't know what is in the pleadings that is immaterial but rather than interrupt the proceedings, I will reserve my objection on the ground of immateriality.

Mr. Berman: May I say also subject to the agreement already made, such parts in the event of court procedure of [172] any kind that the parties may agree are immaterial will be omitted, with the reservation either party may have printed at his own expense the rejected portions.

The Examiner: The same manner as in the previous stipulation?

Mr. Berman: Yes.

The Examiner: Very well, that will be Commission's Exhibit 69.

[The document referred to was marked Commission's Exhibit No. 69 and received in evidence.]

Mr. Berman: I should like to state, Mr. Examiner, that Mr. Samuel W. Murphy of the Electric Bond and Share Company has agreed to furnish us with certain information relating to a breakdown of the personnel presently employed by the respondents in this proceeding, and I ask

that an exhibit number be reserved for the receipt of this information when it is obtained from Mr. Murphy.

The Examiner: That will be Exhibit No. 70?

Mr. Berman: Yes.

The Examiner: The record will so show.

[Commission's Exhibit No. 70 was reserved for the document referred to, same to be furnished later.]

Mr. Berman: That is all we have to submit in the form of documentary proof at the present time, Mr. Examiner, but [*173*] I should like to say that the respondents are to file a supplement to the U5B statement now in evidence on July 1st, according to the rules of the Commission, and that will contain information bearing upon the information now in that U5B statement, and we should like to have the right to introduce that supplement when received and any other material received which bears upon the material now in evidence at a later date.

The Examiner: I assume there will be no objection to that?

Mr. MacLane: No objection.

Mr. Berman: We should like to make a statement at this time, Mr. Examiner, and we make the following statement in order that counsel for the respondents shall be apprised of the contentions of Commission counsel and of the issues in this proceeding as counsel for the Commission see them. It is the position of counsel to the Commission that the data heretofore placed in the record establishes that the continued existence of American Power and Light Company, Electric Power and Light Corporation and National Power and Light Company unduly and unnecessarily complicate the structure and unfairly and inequitably distribute voting power among security holders of the holding company system, the Electric Bond and Share Company. In the first place, it appears that there are superimposed upon each operating company in the holding company [*174*]

system at least two holding companies and a service company. Whatever value or benefit one may ascribe to membership in a holding company system and centralized servicing arrangement, as to which we make no concession, it appears clearly that in the Electric Bond and Share system the holding company functions are centered in Electric Bond and Share Company itself and Ebasco Services, Incorporated, its wholly owned subsidiary, and that the three subholding companies perform no indispensable functions nor even any important functions except the strictly corporate functions necessitated by their own existence. Reference is made to the Ebasco records, Commission's Exhibit 38; Carolina transcript, Exhibit 44, Kansas Gas and Light Company transcript, Exhibit 41; Pennsylvania Power and Light transcript, Exhibit 39; the answer of the respondents in the court case in evidence as Commission's Exhibit 69; Exhibit 45 of the stipulation of facts in evidence as Commission's Exhibit 68; Exhibit 39; the personnel and expense charge of the subholding companies Exhibits 62 to 66 and other data to be filed for which exhibit No. 70 has been reserved, all of which show in the opinion of counsel that these subholding companies are not equipped to and do not render valuable or important services. The only important exception which has been claimed in the past by the chief officials of the system so far as [*175*] the exhibits in evidence show is that the subholding companies provide equity money and it has been admitted that this might have been done by Electric Bond and Share Company itself. Reference is made to Exhibit 45 of the stipulation of facts in evidence as Commission's Exhibit 68. In any event it will be seen that this has resulted in a distribution of voting power which is obnoxious to the standards of Section 11.

The Examiner: What is the result specifically?

Mr. Berman: That the existence of these companies,

these subholding companies has resulted in a distribution of voting power which is obnoxious to the standards of Section 11.

The Examiner: Would you say the mere existence—

Mr. Berman: (interposing) May I elaborate on my statement, please, Mr. Examiner?

The Examiner: Proceed.

Mr. Berman: Among other detrimental results of maintaining these unnecessary companies the record shows that their continued existence results in unnecessary expense of a substantial amount. Thus it appears that the three subholding companies have annual payroll expenses of $230,461; taxes of $530,172 and total annual expenses of $1,102,225 exclusive of expenses for servicing their own [176] securities. Reference is made to Exhibits 63 to 65.

Secondly, the existence of the three subholding companies constitutes a means of unfairly and inequitably distributing voting power in the holding company system. The record establishes that some $2,100,000,000 of consolidated assets of the three subholding company systems are controlled by Electric Bond and Share Company through total investments in securities chiefly in voting securities of the three subholding companies which are carried on the books of the Electric Bond and Share Company at a value of some $120,000,000 or a ratio of approximately 17.50 to 1. Reference is made to Exhibit 55.

This is made possible by a pyramiding structure which centers about the three subholding companies. These companies have combined capitalization totaling approximately $592,000,000 (see Exhibits 52, 53 and 54), of which approximately $108,000,000 of less than 18 per cent is held by Electric Bond and Share Company and is carried on its books as stated above at approximately $120,000,000. The $592,000,000 of combined capitalization of the three subholding companies compares with about $620,000,000 com-

bined corporate assets of these three companies. Reference is made to Exhibits 18-A, 25-A and 52-A.

Such assets include $563,000,000 carrying value of [177] investments of these three subholding companies in their subsidiaries, chiefly in voting stock, but also to some extent in senior securities.

These investments have a book value on the books of the issuing companies of about $538,000,000 as compared with $1,059,000,000 of publicly held securities of these companies. In addition Electric Bond and Share's investment in these companies, that is in its indirect subsidiaries, amounts to $67,000,000 on the books of the issuers, these investments being chiefly in bonds and notes. This amount includes $28,925,000 which is not included in the capitalization of the issuing company, but is carried in current liabilities. The result of this is that Electric Bond and Share Company holds $104,000,000 plus $38,000,000, or a total of $142,000,000 of capital securities of the three subholding companies and their subsidiaries as compared with $1,543,000,000 the investment held by the public. As stated previously the total of the consolidated assets of the three subholding companies systems controlled by Electric Bond and Share Company and as shown on their books is about $2,100,000,000.

The foregoing investment figures represent ledger values on the books of the owning companies and the fore- [178] going capitalization figures represent book values on the books of the issuing companies. The investment figures do not purport to represent present market values. In general they purport to represent the cost to the owning company in cash or in value of securities exchanged for securities acquired, but the figure of $120,000,000 which represented the ledger value of Electric Bond and Share Company's investment in the three domestic subholding companies, also includes $6,230,341 of net appreciation on the books

of Electric Bond and Share Company. Reference is made to Exhibit 43 of the stipulation of facts in evidence as Commission's Exhibit No. 68, and there are further items of appreciation reflected in ledger values of investments in the subholding companies. In citing these book figures as they appear in the published and filed financial statements, counsel to the Commission expressly refuses to admit that the value of the parties' equity represented by the securities is equivalent to the book figures on the books of either the issuing company or the owning company. In this connection the record shows, Exhibit 67, that at the end of 1939 cumulative preferred dividends in arrears on publicly held stock amounted to $30,649,067 in the case of American Power and Light Company, and $40,245,656 in the [*179*] case of Electric Power and Light Corporation. The record also shows substantial arrears on the preferred dividend requirements of various indirect subsidiary companies of Electric Bond and Share Company as established by the exhibits in evidence. It also appears that the preferred stock, even those having substantial arrears carry either no voting rights or the voting right of one vote per share which results in a substantially smaller total vote per class than that of the common stock.

Accordingly, I repeat it is the contention of counsel for the Commission that the holding company system of Electric Bond and Share Company is unduly and unnecessarily complicated and voting power unfairly and inequitably distributed among the security holders of the holding company system as the direct and proximate result of the continued existence of American Power and Light Company, Electric Power and Light Corporation and National Power and Light Company, and that in order to remedy these conditions in accordance with the mandate of Section 11(b)(2) of the Public Utility Holding Company Act of 1935, and in order to comply with the explicit policy of the act

as cited in Section 1-C thereof, it is necessary to discontinue the existence of American Power and Light Company, Electric Power and Light Corporation and National Power and Light Company.

[*180*] The foregoing references which have been made in the course of this statement are merely some of the principal portions of the record. The statement of counsel's contention will be amplified by the proposed findings of fact with fully detailed references to the entire record.

The Examiner: It seems that you have made a clear statement. Have you any comment, Mr. MacLane?

Mr. MacLane: If the Examiner please, in order to formally present this matter, it seems to me that on the state of the record as it stands here at this time that we are entitled to move, and do move either (a) for a dismissal of these proceedings on the ground that no evidence has been offered to support the allegations of the notice and order, or (b) for a definition of the issues which we are required to meet accompanied by a reference to the specific parts of this voluminous record that has been presented here to the Examiner, and which in its present state consists, as you yourself I believe have commented in the course of the hearing, a cumbersome and voluminous record without much guide to us in presenting our case. I call your attention and I do not propose to argue the merits of the case in any sense at this time, but I call your attention to the fact that we have been served by the Commission with a notice and order for hearing in which it is stated on a somewhat summary statement of facts that the Commission has reason to believe that the holding company [*181*] structure of this system is unduly and unnecessarily complicated and that second, voting power is unfairly and inequitably distributed. Now there are involved in this system under the allegations of the notice—I won't stop to attempt to count them definitely, but I will say approximately 40 principal

companies including these three holding companies, the top holding company so-called, the Bond and Share and the operating companies. There is no specification any place in this notice and order of the Commission as to where this complication exists or how or in what companies this voting power is inequitably distributed.

We come here to meet the issue thus tendered by this bill or by this notice and order which we may assume for present purposes at least is a sufficient notice to inaugurate an investigation by the Commission into this problem, but having come here and been here for two days we are furnished with a mere introduction by reference with the conceded right to object at the appropriate time to any particular parts of it, and with the frequently reiterated right through the hearings to ask what portions they are relying upon, and it seems to us that if we are to meet these issues which have been suggested here by counsel in his remarks we shall have to go into the question of the fixation and distribution of voting power, the reason for [*182*] the organization of, the reasons for the existence of each one of these companies and be prepared to meet every statement that may be contained in any of these exhibits without knowing which statement we must meet, how full our testimony must be, to what points it must be directed, or where we must begin and where we may in proper protection of our client's interest properly stop.

This case has two aspects, first in the administrative investigation by this Commission in which I am perfectly to assume that the Commission by reference may examine every document that it has on file and may conclude from the facts stated in that document, and may put in evidence, if any, which is relevant to this determination and that a very wide latitude would be given to this Commission in so doing, but at the same time if this matter stopped with an investigation before the Commission and a determina-

tion by it, and I hope it may stop, I am not here in a controversial spirit, but at the same time, it must be recognized that this is the most vital form of procedure which can be directed against these companies, that it is of the highest moment, the highest importance to a great many investors and to capital representing a very large amount of money.

Counsel says these companies must be eliminated. He proposes an application of what has been called in the utility industry of a "death sentence" and which has been [*183*] referred to by some critics of the industry as a revivification of the industry, but without disputing which it may be, it is certain from counsel's statement that he proposes to liquidate or that the Commission shall liquidate these three holding companies.

The Examiner: I didn't get that last phrase you used, Judge.

Mr. MacLane: Counsel states that his proposal to the Commission shall be that these three holding companies, the National Power and Light Company, the American Power and Light and the Electric Power and Light shall be liquidated, that their existence shall be terminated and that they shall no longer be in being. Now I merely mention without arguing the merits of his proposal or its demerits, or commenting upon its difficulties under present conditions, simply as indicating the importance of the thing to these companies, and unless this matter may be worked out in some way with the Commission without the necessity of the application of the drastic order to these companies then, obviously, the companies must at some time seek redress in the courts and must seek in the course of this procedure, if they can not do it anywhere else, to create, protect and preserve a record upon which they may, if they are forced so to do, seek a court review.

[*184*] Now I submit to you in all candor that as this record stands here today we can not possibly procure an

adequate review or get a review of these proceedings. In other words, we have no record. We have agreed here that all this material which piles up before us may be a part of this record, subject to the right of either side to object to the materiality and relevancy of any of it at the appropriate time. Well, when is the appropriate time? Certainly the appropriate time must be during the presentation by the Commission of its case. Now I hand it to counsel for having made a very able opening statement of his position, but he has done no more than if we were having a proceeding before a court, so such a statement as made would be the one he would be expected to make and it was done very well and has served to clarify what he conceives to be the issues. To what extent his conception may be binding on the Commission I know not.

The Examiner: What, specifically would you suggest by way of amplification?

Mr. MacLane: I suggest that counsel should take this record and should identify those parts of it which are to be part of this proceeding which we should meet, and that we must have one of two rights here at this time, one must be to have the time to go through this record and our copies [*185*] of it, as we have them, and see what there is in it that we may properly object to and see what is in it that is relevant, see what is in it that we may be required to answer at great labor and expense, or else he should be required, and this it seems to me is proper procedure, to identify those portions of the record which he states supports the contention he makes so that we may (a) have a definite record here and (b) so that we may know what we are required to meet. Now otherwise I don't see how we can intelligently proceed. I don't know what my first step should be. I don't know what witness I should call first. I don't know to what I should direct his attention.

The Examiner: Now, have you about finished?

Mr. MacLane: Yes, I think so.

The Examiner: With regard to the first motion to dismiss, I don't think I have any authority to entertain such a motion.

Mr. MacLane: I understood that. I make it merely for the record.

The Examiner: For the record, I would have to deny it as far as my function here is concerned.

Mr. MacLane: I understand that thoroughly.

The Examiner: You are of course at liberty to make that motion before the Commission.

[*186*] Mr. MacLane: I make that formally for the record, that is all.

The Examiner: With reference to the second part of your motion and remarks, while I recognize the difficulty, it seems to me that in the trial of any issue of facts that the defense is usually patterned after the evidence adduced by the party having the burden of proof, and I think it is quite usual that ordinarily the issues at the outset are simply broadly defined through pleadings, in some cases by a bill of particulars. Now I think counsel's statement here seems to me to fulfill the function of the bill of particulars combined with the order. It seems to me it apprises the respondent of the general issues to be met and that the testimony to be hereafter adduced will show or indicate the specific questions which will need explanation or contradiction.

[*187*] And in regard to the voluminous record there are practical considerations both ways, as I indicated, I believe yesterday in the course of the hearing, but inasmuch as so far as I know there is nothing to prevent additional testimony to be adduced should either party require it, even after the matter has reached the stage of submission at specific findings or request for findings, it seems to me the practical solution of the matter is to go ahead on the

basis on which we have started, with the understanding, which I think counsel for the Commission has already indicated, that they are willing to submit requests for findings which will be based and will contain specific reference to any matter relied upon, and that counsel would be willing to be bound and confined to those matters. Is that correct?

Mr. Berman: That is correct, Mr. Examiner. May I add to what I have just said, Mr. Examiner, in this respect?

Judge MacLane has correctly stated that the Commission's order as it was originally served on the respondents did state the issues broadly in terms of the entire system of the respondents, and there may be, as he says, involved some forty companies, and there might be a great deal of work involved in the presentation or preparation of evidence with respect to these companies.

The Examiner: I just want to finish my statement. Inasmuch as counsel for the Commission has agreed to [*188*] be bound by the briefs and the specific requests for findings, and the references therein made to the record, it seems to me that ought to time it sufficiently so in the event of anything like surprise or anything of that sort, that a proper motion could be made for the taking of additional testimony which would be necessary. I am sure the Commission has no desire to foreclose the respondents from presenting any evidence that has any legitimate bearing upon the issues.

Mr. MacLane: It is my understanding that the findings would be tendered by counsel after the evidence is submitted. I don't know that I have made myself sufficiently clear here. I said that I did not propose to argue the merits at this time, but I simply wanted to call attention to the state of this record. Counsel has made some statements as to certain relationships which exists with respect to capitalization; he has made certain statements as to the con-

centration of voting rights; he has made certain statements as to resulting control within the meaning of this Act; and he has also made some statements as to expense. Now, I take it that on his theory of the case these statements of relationship indicate a good deal of suspicion or a ground of contention that these complications [*189*] or complexities, or whatever you may wish to call them, are undue and unnecessary, and that this distribution of voting control is not fair and is not equitable. But I am frank to say that I have not heard any word of testimony to that effect. I understood him to say that is what he would contend upon this voluminous record. Well, I don't know for the life of me what is in the record that throws much light on whether these complications are undue or unnecessary, or whether this voting control and its distribution are unfair and inequitable. That requires a wealth of research, as I see it. I did not propose to make an opening statement with respect to our case at this time, but it seems to me that that involves some consideration under circumstances surrounding the financing of these companies.

The Examiner: May I ask this question? Counsel for the Commission expects to introduce testimony bearing on that question, do you not?

Mr. Berman: Mr. Examiner, we made no commitments as to what we expect to introduce. We feel we have gone far enough with the case at the present time and now it will be the duty of the respondents to proceed to meet the burdens we have raised.

Mr. MacLane: Now, if I may offer an illustration—

[*190*] The Examiner: Just let me ask this one other question, if I may interrupt, please. Do I understand you to say, Mr. Berman, that the Commission does not expect to introduce any testimony to show the meanings or the manner or the method whereby these conditions have created the

inequalities and the unnecessary complications indicated in your statement?

Mr. Berman: May I be permitted to state the position of counsel at this time, Mr. Examiner, and I will take up where I left off before with the statement, that the original order issued by the Commission was in broad form and affected the respondents in many ways under the provisions of Section 11(b) (2), and counsel for the respondents raised the point about the enormity of the issues involved, the task of preparing adequately for a hearing on the broad scope of the issues herein contained, and in order to lighten that burden and in the interest of expedition, the Commission issued its order confining this proceeding initially to the one issue of whether the continued existence of these three sub-holding companies unduly and unnecessarily complicates the structure of the holding company system and unfairly and inequitably distributes voting powers among the security holders thereof. We feel that we have presented sufficient evidence so that that question may be answered in the affirmative.

[*191*] The Examiner: In other words, you feel you have made out a prima facie case?

Mr. Berman: We feel we have made out a case, and I don't wish to rest it on prima facie. It is not necessary to put a witness on the stand to state something. Documents talk, and sometimes a great deal more forcefully than witnesses, and we feel that the exhibits we have placed in evidence have established the affirmative of the proposition which, as we understand it, is to be initially considered at this hearing. Now, there has been a good deal said in the course of the hearing about how voluminous the record in this proceeding is, and how unfair it is to expect the respondents to meet the issues and to meet the substance of this enormous quantity of material introduced in evidence. It seems to me there is considerable misunderstanding in

that regard and I would like to point to it in this way. I think that there are two types of exhibits in this proceeding. The great bulk of the exhibits that were introduced in the earlier stages of our hearing, those which are termed the voluminous records, are what might be termed background or foundational material. That is, material as to which counsel for the Commission did not feel it necessary to present any affirmative case, which it was willing to assume and which it believes that respondents must [*192*] be willing to assume as underlying this case. We did not seek to establish, for example, the terms and articles of the respondents' charters, by-laws, indentures, the location of its properties as shown on maps, the copies of the information it has filed with State Commissions, and the Federal Power Commission. These are all things it has done and it has supplied us with this information, and all we have said is: "This is information you have supplied us with; this is information you have compiled; this is information of which you have copies in your files."

We feel it is fair the Commission should have this information before it as background material against which the main issue here can be projected. Now, the items I have just enumerated, charters, by-laws, indentures, maps, and copies of reports to the Federal Power Commission or State Commissions, together with financial data, those documents constitute the enormous pile of documents which you see before you, Mr. Examiner, and which has apparently impressed the respondents with the fact that they are voluminous and awesome, but they are documents they are acquainted with, which they furnished us, and which belong here as foundational material. So far as the second class of exhibits goes, those are exhibits which can probably be placed in the palm of [*193*] one hand, which we have placed in evidence, and which we claim clearly point the single issue involved at this stage of the proceeding, that

is, the issue of whether it is necessary to discontinue the existence of these three companies in order that the structure of Electric Bond and Share Company shall not be complicated, and voting power unfairly and inequitably distributed. We believe we have placed in evidence exhibits which clearly show that these three companies do unnecessarily and unduly complicate the structure of the holding company system in many ways, and we believe we have shown that they do unfairly and inequitably distribute voting power among the security holders thereof. We may be wrong, but it is for the Commission to say on the basis of the testimony, whether the respondents should have the right to—

The Examiner: Do I understand you to mean that the mere demonstration of the relative relationship is sufficient to rest upon?

Mr. Berman: I mean to say, Mr. Examiner, that the demonstration that the ownership of securities with a value of $120,000,000 on the books of the company which results in giving control to the owners of that $120,000,000 of a vast complex of holding and operating companies which have assets of $2,100,000,000, and which since they do place [*194*] the control in the hands of the owners of that $120,000,000, in effect disfranchises the holders of the other securities of that company, we maintain that certainly is definite evidence of an unfair and inequitable distribution of voting power among the security holders, and we say when it is considered in addition that there are arrearages on preferred stocks which have priority to the holdings of this original owner and the arrearages exceed $70,000,000, that is further evidence that the owners of this small block of stock, relatively speaking, should not have the right, or at least it is unfair and inequitable from the point of view of distribution of voting power, that they have the right to control these companies. And we have

pointed out that it is because of the existence of these sub-holding companies, and through these sub-holding companies, that that type of thing is possible, and we, therefore, say, "Since this is an unfair and inequitable distribution of voting powers, and since it is because of the continued existence of these three sub-holding companies that this is done, in order that voting power not be unfairly and inequitably distributed it is necessary to discontinue these three companies," and we turn to the other facet of the issue and say, "Since these companies as shown by the admissions in evidence to which we have ad- [*195*] verted in the statement of our position, since these sub-holding companies perform no important function except those relative to their own corporate existence, since they in effect cause expense to the security holders of the system, since they serve no useful function, and serve the noxious function of perpetuating these unfair and inequitable distributions of power, we feel that it is necessary that the existence of these companies be discontinued."

Judge MacLane has made the point that this is a very serious business, and I want to make it clear that counsel for the Commission does not in any sense underestimate the seriousness of the situation, but we feel at the same time that the basic philosophy of this Act and the basic philosophy of this action does not rest with us. Congress has passed an Act, and it is for the Commission to administer, and Congress has expressed its position and its purpose and has stated as the policy of this Act that holding companies shall be dissolved or their existence discontinued wherever possible. That is to be found in Section 1 (c). Congress has charged this Commission with the duty of making certain studies involving the corporate relations of these companies. We believe that the documents in evidence constitute the material source book of that study, and we believe that [*196*] the further exhibits we have

placed in evidence clearly present the proof of the issue before us. And further, we have stated that before the conclusion of this proceeding we shall present our proposed findings of fact, we shall state clearly the specific parts of the record upon which we have based them, and which we consider material.

Respondents will have a full opportunity to dispute their materiality, to argue against the force we assign to them, present other conclusions of fact, and point to other parts of this record, and then the matter will go to the Commission for its determination. We feel the respondents will have every opportunity to present every phase of the situation that they feel is important.

The Examiner: Off the record.

[Discussion off the record.]

Mr. Berman: I have said that with respect to the suggestion of the Trial Examiner that the respondents be afforded additional time after the submission of proposed findings properly referenced to the record by counsel for the Commission, that we do not feel we have the power to modify the Commission's rules with respect to the time allowed, but that we feel certain that an application by the respondents for additional time if it should be re- [197] quired in connection with these findings of fact, will receive sympathetic attention. I have also said—

The Examiner: You mean an application made to the Commission?

Mr. Berman: To the Commission. I have also said that we feel we have clearly apprised the respondents at this time of what the issues are in this proceeding, and that the respondents should not have any difficulty whatever in knowing how to go about meeting these issues which we have indicated to be evidence along the lines tending to indicate that the existence of these companies does not unduly or unnecessarily complicate the structure of the Hold-

ing Company System, evidence tending to prove that voting power is not unfairly or inequitably distributed among the security holders of this holding company system as a result of the existence of these sub-holding companies. If the respondents can meet those issues it seems to us they will have met the issues in this case, and they should have no difficulty in knowing how to proceed to do so.

Mr. MacLane: Now, Mr. Examiner, I don't want to take a lot of time, but I want to make my position here clear. Counsel has, as I see it, agreed with me that the notice and order which were served upon us did not apprise us of anything more than that the Commission was going to [198] investigate this question of the undue complication of this system, and the unfair distribution of voting power; that the notice and order did not say wherein or in what companies or how or in what way. There was a supplemental order that said they would consider at this time whether the continued existence of these three companies would have that result. Now, I stated that I thought counsel had made a very fair and a very full opening statement of his views, comparable to that which any competent lawyer would make at the opening of a hearing of his case, which had helped to define the issues which we were proposing to meet.

But I want to ask you if in all your experience as a lawyer you were ever required to offer evidence to meet issues on the day after they were tendered to you. Those issues have never been tendered to us and I had not the slightest idea what counsel was going to contend or what could be contended under this order until Mr. Berman made his very able statement. Now he says that the support for that very able statement he made is contained in his library, as I think Your Honor called it, which comprises seventy-odd numbered exhibits, with some of them having volumes running from A to S or T, and all I am saying to you here is

on the single procedural point, and that is one I think the courts have [*199*] been emphatic upon in recent years with the growing powers of administrative commissions, and that is that the parties brought before them must have a fair hearing and an opportunity to present their case.

I ask you in all fairness whether you ever heard of a lawyer being called on an important case and being confronted with this mass of material and told, "Answer this tomorrow morning." That proposition does not require any argument. He says after we put in our evidence and everything else he will tell us what part of the stuff is material. Do we save any time that way? Is there any advantage to orderly procedure and disposition of this case to have us get out our blunderbuss and bring it in here? And we can bring in a blunderbuss and try to meet everything there is, just as a blunderbuss has been thrust at us, and we can encumber this record with pages and pages and volumes and volumes of testimony to be sure we have met everything. At some time, counsel says, he has to prepare some findings. When? After the evidence is in. He has not suggested that we are going to have any time to put in evidence. He does not even suggest that we may know what his findings are before we are required to tender ours, or have this voluminous volume of stuff identified.

I say that any such procedure as that proposed lacks [*200*] every element of a fair hearing, every element of due process. Now, all I am asking him to do is to do some of the work now that he says he has got to do some time in the future, and let us know what we must meet.

He has not introduced a word of testimony which says that this voting power is unfairly distributed. He says from certain facts it may be concluded and we may look in there and we will find the facts. I assume there are other facts in there which show the considerations on which the stock was issued and the voting power distributed. I am not go-

ing to argue the merits of this thing. I am not going to suggest at this time what our defense will be, but I am suggesting and I do urge that in the interest of orderly procedure and in the interest of due process, that we be told before we put in our testimony what we have got to meet, and not be required to wade through all that material to pick out what we think he may rely on and perhaps not be able to do that, and finally, when we are tendered with findings, we will know what he proposes to rely on. That simply is not a square deal or fair play, just between man and man.

The Examiner: Of course, I will have to take the matter under advisement. But I would like to say this. [*201*] Of course, I have had no opportunity to study the exhibits that have been introduced in evidence, but in the absence of some legislative mandate or some definition that you could rely on, it does not seem to me that a case has been made out by the Commission at this stage of the proceeding. I may be entirely wrong about that.

Mr. Berman: Mr. Examiner, counsel for the Commission think you are, and counsel for the Commission feel that they would like to know from Judge MacLane whether the statements he has made recently are to be construed as a motion to be addressed to the Commission with respect to the various questions he has raised, and if he wants them so construed, are they in the form he thinks is suitable, or does he wish to revise them so they may properly be heard before the Commission.

Mr. MacLane: I don't know what the rules of the Commission are in that respect. I had assumed that the Examiner had power to determine the order of procedure, and I supposed he was competent to make a ruling upon a question of this kind. I don't know whether we have a right to review that ruling before the Commission or whether we should ask for it.

Mr. Berman: I have here the rules of the Commission which I would like to read as far as applicable to the question before us.

[*202*] Rule 6 is entitled "Motions," and states as follows: [reading]

"Motions in any proceeding before a trial examiner which relate to the introduction or striking of evidence, or motions before a trial examiner in any proceeding pursuant to Section 8 of the Securities Act of 1933 as amended,"—that is not here applicable—

"may be ruled on by the trial examiner. All other motions shall be ruled on by the Commission.

"Motions or similar pleadings calling for determination by the Commission shall be filed with the Secretary or other duly designated officers of the Commission in writing, provided that motions or similar pleadings calling for determination by the Commission but made in the course of a hearing, may be filed with the trial examiner in writing, who shall refer such motion to the Commission. Any such motion or similar pleading shall be accompanied by a written brief of the points and authorities relied upon in support of the same. Any party or counsel to the Commission may file a reply brief within 5 days after service upon him of such motion or other pleading as provided in Rule XIV, unless otherwise ordered by the Commission. Motions and similar pleadings will be considered on the briefs filed following the time for filing the reply brief, unless otherwise ordered by the Commission. No oral argument will be [*203*] heard on such matters unless the Commission so directs."

I think this rule clearly indicates the procedure which must be followed.

Mr. MacLane: I suppose under the rule—I am frank to

say that my clients here should probably have someone more familiar with the rules of practice of the Commission than I—but I assume from your reading that this is a motion which in the first instance is properly addressed to the Trial Examiner. It seems to me it is one which is necessarily involved in the order of procedure adopted here. Suppose I had said at the outset, "I can't admit all of this evidence in this form. I have got to be apprised as to what is in it. It will have to be identified and I will have to have an opportunity to inspect it." In any orderly procedure haven't I the right to expect it and haven't I the right to know what is in it? I am not bound because my client prepared the exhibit. I am entitled to look at those exhibits. I could have sat here for days looking through the exhibits, volume by volume, to see what was involved before I stated the motion or agreed to their admission, and I waived all that before by stating that at an appropriate time I could object to the introduction of any part of it or could advise myself as to whether I should meet it.

[*204*] When is the appropriate time? It is during the presentation of the affirmative case. I have not had that opportunity. Now, I am asking for that opportunity and that is all I am asking for.

Mr. Berman: Do you wish to put this in the form of a motion? It seems to me if we are to arrive somewhere, and I take it you are as anxious as we are to reach a determination on this point—that we should follow the procedure established by the Commission and, if you agree that that clearly indicates—

Mr. MacLane: That I should write a motion and a brief?

Mr. Berman: A motion supported by a brief, and if you desire oral argument you have a right to apply for it and you will present the matter to the Commission, who will have an opportunity to reply, and the Commission will rule.

The Examiner: I take it that the Commission has practically rested their part of the case?

Mr. Berman: At this time we have. We feel that we have gone forward as far as we are required to go at this time.

Mr. MacLane: I am willing to follow any procedure to have this matter disposed of. If it is a matter within the province of the Examiner I will tender the motion in such form as the Examiner says I should.

[*205*] The Examiner: I have already indicated that I have no desire or intention—the remarks I have made have been more in the form of a suggestion than anything else—and I have no desire or intention or authority to require the Commission's counsel to follow any particular method of procedure. Now, they have submitted certain evidence. If they see fit to rest on that evidence that discharges that angle of it. If you want to make a motion, any motion that you may make along the lines you suggest, I think will have to be made directly to the Commission.

Mr. MacLane: If I prepare a formal motion and a short brief in support of it, I would like to call attention to some parts of this record. How much time would you be willing to agree, Mr. Berman, that I should have to prepare such a motion and brief, and you to reply to it? In other words, when do you want to present it to the Commission or the Examiner, whichever is appropriate?

Mr. Berman: It seems to me from listening to the argument you made before, that you expressed very forcefully the objections you had to the procedure, and what you felt was wrong with it, and I take it that it should not take very long to embody that in the form of a written motion which would be supported by arguments of the kind you [*206*] made and similar arguments which may occur to you. How much time do you feel you want to prepare such a motion?

Mr. MacLane: Suppose I prepare such a motion and brief and have it in your hands by Saturday morning, and you could reply to it by the following Tuesday and we can argue it before whatever competent tribunal is necessary.

Mr. Berman: That will be satisfactory to counsel for the Commission.

Mr. MacLane: The Commission will fix the time for argument?

Mr. Berman: If you wish oral argument it must be expressly requested. I will supply you with a copy of the Commission's rules.

The Examiner: I believe that the motion should be filed with me, and I will refer it to the Commission.

Mr. MacLane: I will serve it on the other side and, suppose, Mr. Berman, I send you all copies and you do the filing for me? Will you do that?

Mr. Berman: I will be very glad to, Judge. Of course, I should say that as I read the rules, I can't promise there will be oral argument. It states there will be no oral argument unless the Commission so directs, but [*207*] if you wish oral argument that should be stated in the motion.

The Examiner: Off the record.

[Discussion off the record.]

The Examiner: The hearing is adjourned subject to call on three working days' notice.

[Whereupon, at 4:05 o'clock P.M., the hearing in the above-entitled matter was adjourned, subject to the call of the Trial Examiner.]

* * * * * * [264]

Hearing Room 1102,
Securities and Exchange Commission Bldg.,
Washington, D. C., Monday, August 12, 1940.

Met, pursuant to notice of the Commission, at 10 o'clock, A.M.

Before: ROBERT P. REEDER, *Examiner.*

Appearances:

ALFRED BERMAN, Esq.,
MILTON H. COHEN, Esq.,
for the Securities and Exchange Commission.
SIMPSON, THACHER & BARTLETT, by JOHN F. MACLANE, 120 Broadway, New York City, and
REID & PRIEST, by FRANK A. REID, 2 Rector Street, New York City,
appearing for the Respondents.

[265] The Examiner: The hearing will come to order.

Mr. Berman: Mr. Examiner, on June 19, 1940, Mr. James G. Ewell, the trial examiner presiding at that hearing, granted an adjournment subject to his call for the purpose of permitting the respondents to lay before the Commission a motion directed to the evidence presented in the course of the proceeding by attorneys in the Public Utility Division of the Commission. The intervening time has been occupied with the making of this motion and its disposal before the Commission. At this time, if it pleases you, Mr. Examiner, I wish to offer an order of the Commission dated August 5, 1940, designating Robert P. Reeder as the officer of the Commission to preside at this hearing in the place and instead of and with the same powers and duties as the trial examiner heretofore designated to preside at said hearing. I ask that order be received in evidence and marked Commission's Exhibit No. 71.

Mr. MacLane: No objection.

The Examiner: Admitted.

[Commission's Exhibit No. 71 was received in evidence.]

Mr. Berman: I wish to offer at this time, Mr. Examiner, a copy of a letter sent to the counsel for the respondents on August 5, 1940, by Francis P. Brassor, Secretary of the [*266*] Commission, notifying counsel that the hearing would be reconvened this morning and that Robert P. Reeder had been substituted as trial examiner for James G. Ewell, and enclosing a copy of Commission's order to such effect. Will counsel concede receipt of such letter?

Mr. MacLane: Yes.

Mr. Berman: And may a copy be used instead of the original, which is in your possession?

Mr. MacLane: Yes.

Mr. Berman: I offer that as Exhibit 72.

The Examiner: Admitted.

[Commission's Exhibit No. 72 was received in evidence.]

Mr. Berman: In the course of the hearings held on June 18 and 19, Mr. Examiner, exhibit numbers were reserved at the request of Commission counsel for certain material which had not yet been received by Commission counsel, although requested from respondents, and it was agreed that Commission counsel could introduce that material when received. I now offer in evidence, and ask to have marked as Commission's Exhibit 49, that being the number reserved in the record for this material, the material furnished by the Electric Bond & Share Company to Commission counsel at their request, showing the number of shares of the various classes of stock and the percentage represented by proxy and other than by proxy at each of the meetings of the stockholders of [*267*] Electric Bond & Share Company, American Power & Light Company, Electric Power & Light Corporation, National Power & Light

Company, American and Foreign Power Company, Inc., and Ebasco Services, Incorporated, for the years 1935 through 1939. Attached to such material is a letter from Samuel W. Murphy of the Electric Bond & Share Company, transmitting it. I ask that these two papers be received as a single exhibit, and marked as Exhibit 49.

Mr. MacLane: We, of course, have no objection to the authenticity of this information and I assume that it is relevant to Commission counsel's theory of this case. Without conceding our agreement with his theory of this case, we have no objection to its receipt in evidence.

The Examiner: Admitted.

[Commission's Exhibit No. 49 was received in evidence.]

Mr. Berman: In the course of the hearings, Exhibit No. 70 was reserved for information which was being awaited from Electric Bond & Share Company with respect to a breakdown of the personnel of Electric Bond & Share Company, American Power & Light Company, Electric Power & Light Corporation, National Power & Light Company, as of June 19, 1940. That information has been supplied to us by Mr. Murphy of the Electric Bond & Share Company. It comprises four sheets. We ask that it be received as a single exhibit, and marked as Exhibit No. 70.

Mr. MacLane: I have the same statement to make that I [268] made to the preceding exhibit. We admit its authenticity. We do not agree with any conclusions that may be sought to be drawn from it.

The Examiner: Admitted.

[Commission's Exhibit No. 70 was received in evidence.]

Mr. Berman: Mr. Examiner, at this time I will ask that there be received in evidence and marked as Commission's Exhibit 73, a copy of a statement by Commission counsel with respect to exhibits introduced at the hearings held on

June 18 and 19, 1940. It was duly served upon counsel for the respondents and it is part of the record, but I would like to have it incorporated formally under an exhibit number.

Mr. MacLane: No objection.

The Examiner: Admitted.

[Commission's Exhibit No. 73 was received in evidence.]

Mr. Berman: I would like to offer at this time the opinion of the Securities and Exchange Commission, and the order of the Securities and Exchange Commission with respect to the motion made by counsel for the respondents, and filed with the Commission subsequent to the hearings held on June 18 and 19. The Commission's order is dated July 30, 1940. I would like to have it received in evidence as Commission's Exhibit 74.

Mr. MacLane: Does that include both the order and opinion?

[269] Mr. Berman: Yes, the opinion of the Commission and the order.

Mr. MacLane: No objection.

The Examiner: They may be admitted as one exhibit.

[Commission's Exhibit No. 74 was received in evidence.]

Mr. Berman: Mr. Examiner, in the course of the hearings, before adjournment, Commission counsel stated that they were expecting a filing of certain special supplements to the U-5B statements by the respondents and asked to have a reservation made when the material was received and could be admitted. This material has now been received and we would like to start by having these various U-5B supplements received in evidence. The first supplement is that of the special supplement to the U-15B statement of American Power & Light Company, and we would like to ask that it be given Commission's Exhibit No. 16-0,

the original U-5B statement having been given the number 16-A to N, inclusive, and for the purpose of orderly progression, we would like this to receive the next letter number.

The Examiner: All right.

Mr. Berman: These were stamped "Received" by the file room of the Commission as of June 29, 1940. Do you want to take a glance at it, Judge?

Mr. MacLane: I would suggest that these be received [270] subject to the general stipulation and reservations made at the outset of this hearing; otherwise, I would have to take some time to examine them. If counsel is willing to continue that reservation as to these particular exhibits, I will not interrupt the proceedings at this time.

Mr. Berman: I have no objection to continuing the reservation as to these exhibits, except that I want to make it clear that counsel for the Commission not only does concede the relevancy but actually affirms the relevancy of this material.

The Examiner: Admitted.

[Commission's Exhibit No. 16-O was received in evidence.]

Mr. Berman: I ask that there be received and marked as Commission's Exhibit 23-N, the supplement to the U-5B statement of Electric Power & Light Corporation stamped "Received" as of August 1, 1940, subject to the same conditions.

Mr. MacLane: Subject to the general reservation at the outset of the hearing as to my right to introduce specific objections later, I have no objection.

The Examiner: Admitted.

[Commission's Exhibit No. 23-N was received in evidence.]

Mr. Berman: I ask that there be received and marked as Commission's Exhibit 30-J, the supplement to the U-5B

statement of National Power & Light Company, stamped "Received" August 1, 1940.

[271] The Examiner: The same reservation?

Mr. MacLane: No objection, subject to the same reservation.

The Examiner: Admitted.

[Commission's Exhibit No. 30-J was received in evidence.]

Mr. Berman: May I state, Mr. Examiner, that each of these dockets is preceded by an index which states its contents and in each case the contents are divided into four items, numbers (b), (c), (d), and (e), respectively: (b) setting forth certain information with respect to revaluation statements; (c) being a transcript of open accounts payable; (d) setting forth information as to the depreciation or retirement reserve account, the depreciation policies of the system and the amount of depreciation allowed or claimed for Federal income taxes; (e) setting forth the consideration for securities issued or sold. Now counsel for the Commission would like to advise respondents that they rely specifically on item (e) of Exhibit D of each of the three dockets just admitted, which shows the consideration for securities issued since date of inception by the sub-holding company respondents and subsidiaries thereof as of December 31, 1938. This material is to be used to supplement the statement served upon respondents marked Exhibit 73 in the following particulars:

[272] On page 15 of said statement, there should be added an item 2(a) immediately following item 2 on page 15 of said statement. Item (2)a will state Exhibits 16-O, 23-N, and 30-J. That will be the caption of item 2(a), and then there will be stated that these exhibits include form U-5B special supplement of American, Electric, and National, respectively, Item (e) of Exhibit D shows consideration for securities issued or sold since date of inception by

the sub-holding company respondent and subsidiaries thereof as of December 31, 1938. The same statement will appear on page 20 of the statement as item 3 (a), on page 22 as item 5(a), and on page 24 as item 4(a). The effect of these additions to our statement is merely to permit us to rely on this additional and supplemental material in the same way that we relied upon the early material furnished us by the respondents, and for the same purposes. I believe counsel for the respondents will find that some of the information contained in these items clears up questions he had raised during the hearing as to the consideration received and as to write-downs and break-ups of securities, questions which had arisen in the course of the last hearing.

At this time, Mr. Examiner, I would like to have admitted in evidence and marked as Commission's Exhibits 18-G and 18-H, [*273*] certain material filed with the Commission by American Power & Light Company as a supplement to its U-5S report for 1939, which contains additional reports for 1939 to stockholders and State commissions and regulatory bodies, and additional contracts. The material consists of two volumes bearing Commission's Docket Numbers 30-144-2-7 and 30-144-2-8. This material is being included and is being relied upon by Commission counsel in the same way as the same material for earlier years which had been furnished by the respondents or stated by the Commission counsel to be relied upon, and is intended merely to bring this information up to a later date.

The Examiner: It may be admitted subject to the same reservation on behalf of the respondents.

[Commission's Exhibits 18-G and 18-H were received in evidence.]

Mr. Berman: I ask that there be received and marked as Commission's Exhibit 24-F supplementary material filed by Electric Power & Light Corporation for the year 1938,

containing an additional report for 1938 to state commissions, bearing Commission's Docket No. 30-143-2-6, stamped "Received" by the Commission August 1, 1940.

Mr. MacLane: Subject to the same reservations, I have no objection to the document being admitted.

The Examiner: Admitted.

[Commission's Exhibit No. 24-F was received in evidence.]

[*274*] Mr. Berman: Commission counsel state that they rely upon this material for the same purposes as reports to State commissions were relied upon in the statement previously furnished to counsel for the respondents. We ask that there be received as Commission's Exhibit 25-G an additional report filed with the Commission by Electric Power & Light Corporation in connection with its U-5S statement for 1939, this material containing additional reports to State commissions filed by Electric Power & Light Corporation during that year. This material is relied upon for the same purposes as reports filed with State commissions were stated to be relied upon in the statement previously supplied to counsel for the respondents.

Mr. MacLane: No objection to its being offered at this time, subject to the same conditions as heretofore stated.

The Examiner: Admitted.

[Commission's Exhibit No. 25-G was received in evidence.]

Mr. Berman: Mr. Examiner, at this time we would like to suggest or request that a recess be granted in order that counsel for the Commission may confer with counsel for the respondents with respect to matters which are germane to the proceeding, and in order that adequate time be allowed we suggest that an adjournment be taken until 2:30, to allow for lunch and conference.

The Examiner: We will recess until 2:30.

[*275*] [Whereupon, at 11:15 oclock A.M., a recess was taken until 2:30 o'clock P.M., of the same day.]

* * * * * * [292]

Hearing Room 1102, A
Securities and Exchange Commission Bldg.,
Washington, D. C., Monday, September 9, 1940.

Met, pursuant to adjournment, at 10'oclock A.M.

Before: ROBERT P. REEDER, Trial Examiner.

Appearances:

ALFRED BERMAN,
MILTON H. COHEN,
for the Securities and Exchange Commission.
SIMPSON, THACHER & BARTLETT, by JOHN F. MACLANE, 120 Broadway, New York City, and
REID & PRIEST, by FRANK A. REID, 2 Rector Street, New York City,
appearing for the Respondents.

[293] The Examiner: You may proceed.

Mr. Berman: May it please you, Mr. Examiner, subsequent to the adjournment of the hearing at the last session in this proceeding, the Securities and Exchange Commission issued its memorandum opinion and order with respect to procedural matters concerning adjournment, and I now ask that the original of the Commission's opinion and order be received in evidence as Commission's Exhibit 75.

The Examiner: Admitted.

[Commission Exhibit 75 was received in evidence.]

Mr. MacLane: If the Examiner please in connection with the introduction of that exhibit, I have no objection of course to its introduction, but I think it is only fair to the respondents to comment that the statement made by the Commission in the order, which is doubtless an inadvertence, that counsel (that is for the respondents) have requested a continuance to September 9, and have stated that such continuance is necessary; first, to formulate objections

on the ground of relevancy of certain of the documentary evidence in the record; and second, for the further preparation of respondent's case—does not comport with the statement which we made. We stated that we were prepared to state our objections, but we thought it would be more convenient if the hearing were [*294*] adjourned to permit us to formulate them; and furthermore, we made no application and have made no application for a continuance since the case started on the 17th, I believe it was, of June, for the purpose of obtaining time for preparation. I merely thought that it was due to us to make that statement in the record so that our position would be clear. It doesn't affect the substance of the situation.

The Examiner: Well, whatever you stated at the oral argument before the Commission was taken down at that time, doubtless.

Mr. Berman: Yes, I think it will be made clear. Mr. Cohen pointed out in the oral argument that no formal motion was before the Commission on the part of the respondents, but the substance of conferences between counsel and ourselves, and on that basis the Commission thought it advisable to act.

Mr. MacLane: I didn't want the imputation of recalcitrancy to remain unchallenged.

[Discussion off the record.]

Mr. Berman: If you will permit us, I regret to ask at this time, Mr. Examiner, but I should like to have a very brief recess in order to discuss with counsel a certain stipulation and see what we can agree as to its terms. It is necessary to do this because if we agree on a stipulation, that will substantially complete Commission counsel's case, and counsel for the respondents prefer that we proceed in that [*295*] manner.

The Examiner: How long a recess do you desire?

Mr. Berman: Five or ten minutes.

The Examiner: We will take a short recess.

[Whereupon, a short recess is taken after the hearing is resumed.]

Mr. Berman: Mr. Examiner, in the opinion of the Securities and Exchange Commission issued on July 30, 1940, in the present proceeding, which opinion is in evidence in this proceeding as Commission Exhibit 74, on page of said opinion the Commission expressed the view that the references to sections 6 and 7 applications, and declarations, are not sufficiently specified, and unless further specification is made, the Trial Examiner is directed not to treat these documents as evidence sufficiently specified in the present proceeding. In the pursuance of this statement by the Commission counsel for the Public Utilities Division seeks at this time to remedy the deficiency to which the Commission alluded and for that purpose it states that it relies upon the following pages of the official transcripts of the various financing proceedings in the following manner and with the following specific references:

The proceeding of Portland Gas & Coke Company, Commission Docket 70-23-1-2, testimony of Paul B. McKee, page 9, line 21 to page 10, line 12;

Page 26, line 26 to page 27, line 1;

[296] Page 33, line 18 to page 35, line 5;

Page 39, line 9 to page 39, line 24.

Testimony of Samuel W. Murphy: Page 45 to page 56;

Page 123 to page 140.

Northwestern Electric Company, Commission Docket 32-173-1-4:

Testimony of Paul N. McKee, page 13 to 19, line 13; page 50 to 57.

Testimony of George G. Walker: Page 127 to page 153.

Testimony of Duncan R. Linsley: Page 155 to page 183.

Testimony of David W. Jack: Page 184 to 193.

Washington Water Power Company, Commission Docket 42-220-1-2:

Testimony of K. M. Robinson; page 5, line 5 to page 9, line 6;

Page 16, line 6 to page 17, line 17.

Testimony of Samuel W. Murphy; page 26 to page 41; page 72 to page 73.

Testimony of Francis Kernan, Jr.: Page 46 to page 56.

Kansas Gas and Electric Company, Commission Docket 70-23- [*297*] 1-2:

Testimony of Murray M. Gill: Page 8 to page 18, line 8.

Testimony of Samuel W. Murphy: Page 30 to 60, line 4.

Testimony of Charles E. Koch: Page 73 to page 81, line 16.

Pennsylvania Power & Light Company, Docket 32-164-1-3:

Testimony of John S. Wise, Jr.: Page 11 to page 12.

Testimony of Samuel W. Murphy; Page 27 to page 54; Page 101 to page 125, line 20; page 196 to page 211.

Carolina Power & Light Company, Commission Docket 70-52-1-3.

Testimony of Samuel W. Murphy: Page 7 to page 16; Page 21 to page 60, line 22.

Testimony of Louis V. Sutton: Page 90 to page 104, line 11.

In each case where I state from one page to another, it is to that other page inclusive, of course. Taking the proceedings, the titles of which have been recited in order, the proceeding of Portland Gas & Coke Company is in evidence in this proceeding as Commission's Exhibits 40-A and

40-B; the proceeding of the Northwestern [298] Electric Company is in evidence here as Commission's Exhibit 43; the proceedings of Washington Water Power Company is in evidence as Commission's Exhibit 42; the proceedings of Kansas Gas & Electric Company is in evidence as Commission's Exhibit 41; the proceedings of Pennsylvania Power & Light Company is in evidence as Commission's Exhibit 39; and the proceedings of the Carolina Light & Power Company is in evidence as Commission's Exhibit 44.

Mr. MacLane: I understand from your last statement, Mr. Berman, that what you mean is that this testimony is contained within the documents which have been identified as Commission exhibits numbered as you have stated?

Mr. Berman: That is correct.

Mr. MacLane: In other words, these are the parts of the exhibits on which you are relying and which you specifically offer in evidence?

Mr. Berman: In support of the various propositions for which these various exhibits were cited in our original statement to you.

Mr. MacLane: Yes, all right.

Mr. Berman: We believe that these references satisfy the requirements of the Commission's opinion, and we understand that counsel for the respondents agree that that is so as to its specificity?

Mr. MacLane: We agree that this is sufficient specifica- [299] tion of the parts of the exhibits to satisfy the objections which we made to the receipt of these voluminous exhibits in bulk, and I believe that we are willing to agree that this testimony may be regarded as in evidence here with the same effect and to the same extent as though these witnesses had personally appeared and made these statements in this proceeding.

Mr. Berman: That is agreed.

Mr. MacLane: However, we of course have not had an opportunity to check these parts of the records to see whether counsel has inadvertently omitted anything which might qualify, explain, or otherwise affect what is stated, and we wish to expressly reserve the right, if we find such a case, to call attention to any other parts of the records which might be properly considered in connection with what he stated. I make that observation merely out of caution and not because I believe there is anything of that kind, but simply because it is of course possible that there may be something which counsel has inadvertently not specified.

Mr. Berman: Well, Judge, these of course are the references upon which we, the Commission counsel, rely. They do not bind you in any way, and you have the right to seek to contradict or vary them or supplement them as you see fit.

Mr. MacLane: I am referring solely to what the record on its face discloses. Now, as to the general proposition, of course the holding companies in question were not parties to [*300*] those financing proceedings, and my stipulation at least that these witnesses may be regarded as having testified as shown on these pages of these exhibits, does not preclude witnesses on behalf of these companies, appearing in this proceeding and further explaining or stating, if they have anything further to explain or state, as to their connection with financial matters.

[Discussion off the record.]

Mr. MacLane: On the assumption, Mr. Examiner, that Commission counsel has now completed the testimony which he proposes to offer, before he formally announces that he rests, or its equivalent, I desire to file here our objections to the exhibits and parts of the exhibits for the formulation of which this hearing was adjourned on August 12. I am perfectly willing to avoid the delay which

would be incident to reading these objections for the record, but I may say the objections are stated in merely a few pages of this volume which I am going to offer, the balance of the pages being merely a catalogue of the exhibits, which was prepared so that we could specifically call attention to those parts which we understood were not relied upon so that they may at an appropriate time be stricken from the record. Should this be marked as an exhibit?

Mr. Berman: What form does it take, Judge, is it in the form of a motion to strike, or a motion containing objections [*301*] on the ground of relevancy and materiality, and so forth?

Mr. MacLane: The document is designated, "Statement by respondents' counsel on objections to exhibits and parts of exhibits," and its opening paragraph reads as follows:

> "Pursuant to the reservation of the right to make objections to documentary evidence offered by the Commission counsel as exhibits, noted in the transcript of hearing of June 18, 1940 (identified by pages) and the opinion and order of the Commission dated July 30, 1940 (Commission Exhibit 74) upon the respondents' motion addressed to said exhibits at the conclusion of the hearing on June 19, 1940, the above-named respondents Electric Bond & Share Company, American Power & Light Company, Electric Power & Light Corporation, and National Power & Light Company, enter on the record herein the following objections to said Commission exhibits."

These objections are specified to the exhibits in their chronological order. At the conclusion of the statement of the objections, the following statement is made:

> "The foregoing objections are stated for the record in accordance with the reservation first above set forth

and the opinion and order of the Commission dated July 30, 1940, and also in accordance with leave granted by the Commission to formulate such objections in its memorandum and opinion order dated August 13, 1940. As stated in said opinion order respondents by their counsel waive any right to insist upon [*302*] said objections being presently passed upon either by the Examiner or the Commission, with the distinct understanding, however, to be preserved by stipulation in the transcript of oral record, that such objections are not waived but are preserved to be passed upon by the Commission before the final submission of the case."

Mr. Berman: Well, I take it that this statement will be construed as a motion for purposes of it being passed upon by the Examiner or the Commission, whoever is to pass upon the objections? If counsel for the respondents wish, they can, during the course of presenting their evidence, offer this statement in evidence as an exhibit I take it, Mr. Examiner although I suppose it would form part of the record of the proceedings whether or not it is received as an exhibit? I take it that that is up to them. Certainly Commission counsel will not offer it as an exhibit. As counsel for the respondents have said, the understanding is that a ruling on these objections will not be pressed for at this time. Accordingly, counsel for the Commission reserves the right, at some proper time in the course of this proceeding, to file herein, in the record of the proceeding, a reply to these objections, joining issue with the respondents and stating the position of the Commission counsel with respect to these various objections. That will be done at some time prior to the conclusion of the proceeding and [*303*] before these objections are ruled upon.

[Discussion off the record.]

Mr. MacLane: The respondents will at this time offer this document entitled "Statement by respondents' counsel on objections to exhibits and parts of exhibits", and in lieu of having it copied into the record, into the transcript of the record, as might be otherwise appropriate procedure, is willing that it should be designated and suggested to be designated as Respondents' Exhibit No. 1.

Mr. Berman: No objection.

Mr. MacLane: May it be expressly stipulated upon the record that these objections as noted in Respondents' Exhibit No. 1, are preserved for the record with the same effect as though they were copied into the transcript of the oral record, and that decision thereon may be reserved with the right of Commission counsel to file counter statement before action upon them.

Mr. Berman: It will be so stipulated.

The Examiner: It is so ordered, and the document is admitted as Respondents' Exhibit No. 1.

[Respondents' Exhibit 1 was received in evidence.]

Mr. Berman: Will the record show then, Mr. Examiner, that we have no further evidence to adduce at this time.

Mr. MacLane: The Commission counsel having completed [*304*] their case at this time, and in effect having rested with whatever effect a rest may have on a proceeding of this kind, the first thing that respondents should do, I think, in connection with this record is to formally withdraw the appearance which we made at the outset for American & Foreign Power Incorporated, which was dismissed as a party to these proceedings by an order of the Commission dated the 17th of June, 1940, and which appears as one of the exhibits in this case. Consequently, the appearance of Simpson, Thacher & Bartlett, by John F. MacLane, and the appearance of Reid & Priest by Frank A. Reid, for the American & Foreign Power Company Incorporated, are withdrawn.

Mr. Berman: That was done, I believe, Judge, at an earlier point in the proceeding, but I have no objection to doing it again if you wish.

Mr. MacLane: I think I stated that I would do it at an appropriate time.

Mr. Berman: That may have been the case. However, there is no objection.

Mr. MacLane: We have prepared for the record, as we stated would be prepared at the last session here, a formal motion to dismiss, and I tender this document entitled, "motion to dismiss" in this proceeding, to the reporter, and ask that it be marked Respondents' Exhibit No. 2; and am handing 20 copies of the printed motion to counsel for the [*305*] Commission. I ask that this motion to dismiss be received as Respondents' Exhibit No. 2, and for the reason stated therein I at this time move that these proceedings be dismissed as against the respondents, American Power & Light Company, Electric Power & Light Corporation, and National Power & Light Company. As agreed with the Commission at the former hearing on August 12, I waive any right that we might otherwise have to urge this motion before the Commission at this time, with the understanding that it is to be preserved in the record for submission in connection with the final submission of the case, or such earlier time as the Commission may order of its own motion.

Mr. Berman: I believe, Judge, that the rulings of the Commission provide that a motion of this type should be filed either with the Secretary of the Commission or with the Trial Examiner, so that I think the Trial Examiner should receive these more appropriately.

[Discussion off the record.]

The Examiner: The motion is received and will be referred to the Commission at the appropriate time.

[Respondents Exhibit 2 was received in evidence.]

[306] Mr. MacLane: I now tender to the Examiner as Respondents' Exhibit No. 3, a document entitled, amended answer, dated September 9, 1940, and signed by Simpson, Thacher & Bartlett, by myself; and by Reid & Priest, by Frank A. Reid; also accompanied with 20 copies. I ask that that amended answer be received as Respondents' Exhibit No. 3.

Mr. Berman: Might I say with respect to that, Mr. Examiner, that I am not certain what the rules of the Commission require as to amendments to formal documents, I mean the time limitation. I must reserve the right to object on that ground, if it should appear that the time is greater than that permitted; but I would say otherwise that I am not disposed to stand on any formal objection. I want to have the right to examine the rules of the Commission with respect to amendments to pleadings and so forth. In other words, I don't know whether the respondents have the right at this time to amend their answer as a matter of course at this date in the proceeding, and I reserve the right to inquire into that matter and possibly to make some objection on that ground, although I don't contemplate that I definitely will.

Mr. MacLane: I want to call attention to the fact that on page 9 of the record I mention the fact that the original answer was filed with the Commission on June 5, 1940, and asked it to be deemed as regularly filed and part of the [307] record. Then the stenographer has noted a discussion off the record. I may say that that discussion was to this effect, that the answer should be identified as an exhibit when we came to submit our case, and then there appears in the record:

"Mr. MacLane: At what the Commission deems the appropriate time I presume this answer may be filed as part of our case and in the statement now made of

the appearances we reserve the reservations stated in that answer."

Consequently, there is, as the proceedings were conducted no answer which has been formally received in the case. If there is any question of the appropriateness of this amended answer, I suppose our original answer should be filed. There is really no difference between the two documents except that the amended answer omits all reference to the American & Foreign Power Company, and has dropped it because of the fact that American & Foreign has been dismissed from the proceedings. It therefore seemed to us inappropriate to at this time offer as an exhibit or as a filing, an answer on behalf of American & Foreign Power Company.

Mr. Berman: Is that the only change?

Mr. MacLane: No, just a moment—and in addition to that, there is one other thing, one other change in the amended answer in the insertion of a final paragraph 53, which refers to the so-called tentative plan of integration filed by Bond & Share in 1938. [*308*] Now, that was previously referred to only—and possibly indirectly—in part 1 of the answer, and it seemed to me that possibly the reference was not complete. Consequently, since we were filing an amended answer, we, in addition to excluding the American & Foreign Power Company, added this paragraph 53. Otherwise, the two documents are, I believe, precisely the same.

Mr. Berman: I think Judge MacLane is not correct in stating that because the previous answer, the original answer of the respondents, has not yet been received in evidence, that it does not form a part of the record in this proceeding, because it is my understanding that any of the pleadings filed in a proceeding, so long as they are formally filed, actually form part of the record even though they

have not been formally introduced as an exhibit. In a sense the introduction as an exhibit is superfluity, you might say, and merely done to keep the record perhaps in a more orderly way, but the original answer, of course, will form part of the record in this proceeding and I merely raise the question about whether you had the right to amend the answer at any stage of the proceeding. I don't assume we will want to stand on any technical objection there, but I did want to reserve some right to inquire into the matter.

The Examiner: Received as Respondents' Exhibit 3, subject to Commission counsel's right to object.

[*309*] [Respondents' Exhibit 3 was received in evidence.]

Mr. MacLane: So long as the original answer is a part of the record, I shan't further encumber it, by identifying the original as an exhibit, because we are going to proceed on the theory that the amended answer is the answer under which our case is being presented. Now, Mr. Examiner, I have remarked two or three times here that I claim no expertness in the presentation of these matters before the Commission. Generally speaking, the proceedings are not unduly formal, but it seems to me appropriate, in a case of this importance, to proceed generally as though it were a proceeding in a court at law, and if this were a proceeding in a court of law, I would at this time outline the issues as we understand them here, and the evidence which we propose to tender in support of the issues on our part, and give the Examiner or the Commission some guide to the purpose and scope, and what we conceive to be the effect of the testimony which we propose to offer. Therefore, with the permission of the Examiner and if there is no objection on behalf of counsel, I shall proceed to make a statement somewhat in the nature of an opening statement of counsel in a defense of a proceeding at law.

This proceeding is brought under Section 11(b)(2) of the

Public Utility Holding Company Act which provides, so far as here material, that it shall be the duty of the Commission as [*310*] soon as practical after January 1, 1938, to require by order, after notice and opportunity for hearing, that each registered holding company and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to insure that the corporate structure or continued existence of any company in the holding company system, does not unduly or unnecessarily complicate the structure or unfairly or inequitably distribute voting power among security holders of such holding company system.

The proceeding has been initiated by the Commission under this section by notice of and order for hearing, addressed to Electric Bond & Share Company, and the subsidiary holding companies in its system, and Ebasco Services Incorporated. This notice and order, after a description of the system, states in paragraphs 46 and 47 that the Commission has "reasonable grounds to believe that" the "structure of the holding company system of said Electric Bond & Share Company is unduly and unnecessarily complicated," and that "voting power is unfairly and inequitably distributed among security holders of the system".

By a supplemental order dated June 7, 1940, the Commission limited the hearing "initially to the issue of whether it is necessary to discontinue the existence of American Power & Light Company, Electric Power & Light Corporation, [*311*] National Power & Light Company, and American and Foreign Power Company Incorporated, or any of them, in order to insure that the structure of the holding company system of Electric Bond & Share Company shall not be unduly or unnecessarily complicated, and that voting power shall not be unfairly or inequitably distributed among security holders of such system".

Subsequently, by order dated June 17, 1940, American

and Foreign Power Company Incorporated was dismissed as a respondent in the proceeding, and consequently the hearing at the present time is limited to the question of whether it is necessary to discontinue the existence of American, National or Electric Companies.

However, since the order of June 7, 1940, expressly the reserved jurisdiction over the whole question of corporate simplification of the system, including other subsidiary holding companies originally name, Ebasco Services and subsidiary operating companies, the respondents have filed and there has been accepted as part of this record, a comprehensive answer to all the issues, and the entire issue raised by the notice and order, and, as we shall develop in the testimony, the question of the elimination of these three above-named holding companies and the resultant redistribution of voting power cannot be solved in vacuum, but must be solved by considering the system as a whole and the relationship of its component parts.

[*312*] This, we believe, is clearly recognized in the testimony or exhibits offered and identified by Commission counsel, as well as in their statement of their contentions, as orally expressed at the hearing of June 19th, and embodied in the transcript beginning at page 173.

We think it appropriate to observe that in its original Notice and Order, even as supplemented and limited by the Order of June 7th, the Commission has made no specification of reasons or grounds for its charges, if they be such, that the holding company system of Electric Bond and Share Company is unduly or unnecessarily complicated or voting power unfairly or inequitably distributed. Presumably the Order was intended to initiate an investigation of the subject on the basis of which their specific charges might be predicated, or tentative conclusions reached, upon which, after such further formalities as the law may require, a definitive order might be issued.

I am not discussing at the moment whether this is or is not an appropriate method of procedure. My only point in the observation here is that by its Order, on which this hearing is being held, the Commission has opened a field of investigation as broad as the statute itself. Counsel for the Commission has endeavored to clarify the issue on making the statement of their position (Transcript, pages 173 to 180).

As we understand counsel's position briefly is as follows:

[*313*] First—there is superimposed on each operating company in the system two holding companies and a service company. That all proper holding and service company functions could be performed by Electric Bond and Share Company and Ebasco Services, and "that the three sub-holding companies perform no indispensable functions, nor even any important funtions, except the strictly corporate functions necessitated by their own existence, and that the continued existence of the sub-holding companies results in unnecessary expense, aggregating for the three companies in the year 1939 approximately $1,102,225.

Second—the existence of the three sub-holding companies constitutes a means of unfairly and inequitably distributing voting power, in that same $2,100,000,000 of consolidated assets of the three sub-holding company systems are controlled by Bond and Share through the total investments carried on the books of Bond and Share at a value of $120,000,000, or a ratio of approximately 17.5 to 1. The market value of the securities owned by Bond and Share is much less than the ledger value. In this connection it is pointed out that there are preferred dividends in arrears on publicly held stock of American Power & Light Company and Electric Power & Light Corporation as well as substantial arrears on preferred dividends of some subsidiaries. On these facts it is concluded that the holding

company structure and resulting dis- [*314*] tribution of voting power are obnoxious to the standards of the statute, and that these three sub-holding companies should be eliminated through termination of their corporate existence.

Despite the vague language of the statute, and the breadth of discretion thereby vested in the Commission, we do not believe that the conclusions of "undue" or "unnecessary" complications or "unfair" or "inequitable" distribution of voting power may be predicated on the simple facts that there are two holding companies and that a relatively small portion of investment "controls the whole." However this is a question for Commission determination and is not argued here.

But, as the case now stands it is necessary that the Respondents prove that the holding companies have in the past, now continue, and will in the future perform a useful function in the system. That the expense of maintaining their existence is not disproportionate to their utility, and the distribution of voting power between security holders is neither unfair or inequitable.

I do not mean that this burden rests affirmatively upon Respondents under the statute and I do not imply or concede that each of these facts must be proven to meet any burden that Respondents must carry, but I do mean that to meet fully the contentions of Commission counsel and the general charges of the Notice and Order that counsel for the Respondents in discharge of their duty to their clients must cover the [*315*] whole case for any determination that the Commission initially or the courts ultimately may make as to the meaning and effect of this statute and the duty and power of the Commission thereunder. Consequently, it seems to me we must show what this holding company system is. We must show the relationships of the parts, that is, of the operating companies to the holding companies immediately involved and their relationship in

turn, to Bond and Share. We must show what functions the holding companies and Bond and Share played in the creation of the system and we must show how and on what considerations voting power was distributed among security holders. We must show what functions the holding companies presently perform, and we must show what utility they will serve in the system in its future evolution under the statute.

Now I am not unmindful that this system is under attack in a companion proceeding pending before the Commission involving application to it of the integration provisions of Section 11(b) (1) of the Act. I recognize that it will be contended on behalf of the Commission in that proceeding and it may be found by the Commission, that this system cannot continue to exist as at present constituted, but that there must be a re-grouping of properties and complete or partial dissolution of Bond and Share control over the properties as re-grouped. That in this process some of those sub-holding companies must limit their operations and as a result thereof [*316*] modify their structure.

It has been and is difficult for me to see how Section 11(b) (2) can be applied to the companies in this system, until the ultimate form of the system or resulting systems is determined under 11(b) (1), and I believe the Commission has recognized this in its press release suggesting the possibility of consolidating the two proceedings. Some of the testimony which we will introduce will be pertinent not only to this proceeding but also to the proceedings under Section 11(b).(1).

[*317*] Specifically, we shall contend in this proceeding that the place of these three holding companies, National, Electric and American in any regrouping of properties by way of integration under Section 11(b) (1) must be taken into consideration. This will involve some examination, not for approval or rejection, but by way of description, of the

integration plans submitted by Bond and Share in November, 1938.

The future functional utility of the holding companies must of necessity involve their relationship to such a plan of integration, and hence testimony with respect to that plan, not for the purpose of securing its definitive consideration, but for the purpose merely of relating these existing holding companies to such plan, will be necessary in this proceeding.

In the presentation of our testimony, we shall avoid as far as possible any surplusage or duplication, but we desire, even at the expense of some time, to develop our record clearly and systematically, placing definitely in the record such definitive matter and such portions of exhibits as may be otherwise available to the Commission which will nevertheless be essential to a clear narrative statement and understanding of the situations described and the facts upon which conclusions will be predicated.

Now I do not propose to argue here any question of law, but I think it is both appropriate and desirable that I state our legal position following generally our answer so that the [*318*] relevance of some of our testimony to the legal position may be clear.

The answer contains four parts:

Part I is a statement of the constitutional and legal objections to Section 11(b) (2) of the Act and the procedure adopted by the Commission looking to its enforcement. These objections are taken either to the statute itself or to the form of the Notice and Order and the procedure adopted by the Commission thereunder. They require no testimony in their support. They involve purely questions of law and are reserved for argument either before the Commission in connection with final submission of the case or later in the courts, if legal proceedings should result from the Commission's Order. It is sufficient to say here

that by proceeding with our testimony we do not waive these constitutional and legal points, but expressly reserve them in the record for later consideration.

Part II of the answer is strictly a technical answer, admitting, denying, qualifying or explaining the allegations, statements or charges made in the Notice and Order. In substance, it denies that the holding company system of Bond and Share and the sub-holding companies is unduly or unnecessarily complicated and denies that voting power is unfairly or inequitably distributed, and alleges affirmatively that the system is simple and free from complication, and that voting power is fairly and equitably distributed.

[*319*] Part III may be said to be a counterpart of Part II. It alleges affirmatively the composition of the system, voting power attributable to securities, and like matters. For present purposes it may be sufficient to refer here to paragraphs 45 and 46 of the amended answer on pages 15 and 16, which were paragraphs 48 and 49 on pages 17 and 18 of the original answer.

Without reading them in detail, paragraphs 48 affirmatively alleges that all securities issued by the various companies in the system were lawfully created and issued in accordance with the applicable laws of the States involved and in accordance with lawfully adopted and applicable provisions of charters and by-laws of the companies. That the voting powers with respect to securities were fixed by contract. The securities to which they pertain were delivered for property or sold for cash, with voting rights attached thereto, in all respects in accordance with applicable laws and prior to the passage of the Holding Company Act, and upon these facts it is alleged that any involuntary impairment or violation of Respondents, or any other stockholders' vote or other titles or rights would be without due process of law.

Paragraph 46 of the amended answer, which was para-

graph 49, alleges that neither Bond and Share nor the other holding company Respondents here involved are engaged in interstate or foreign commerce or in transactions affecting such commerce; [*320*] that the subsidiaries are engaged primarily in intrastate public utility business, and such of them as are engaged in interstate commerce are so engaged only incidentally; that neither Bond and Share nor any of the Respondents control, obstruct, impede or affect interstate or foreign commerce done by subsidiaries, nor does present corporate existence or structure or distribution of voting power of any company in the system affect such interstate or foreign commerce.

Whatever position the Commission may eventually take with respect to either contract rights of security-holders or questions arising under the commerce clause of the Constitution, it is obvious that it is incumbent upon Respondents in this proceeding to show for consideration of the Commission and preservation of the record on their constitutional defenses, the manner of creation of security issues with the voting rights pertaining thereto and the relationship to interstate commerce of the various companies in the system. While we do not assume that the Commission itself will be greatly concerned by the exact degree or extent to which particular subsidiaries of holding companies may be engaged in interstate commerce or in business so affecting interstate commerce as to be subject to Federal regulation, we believe that it will not be disputed, that if it were affirmatively shown as to any particular holding company and its subsidiaries that no interstate commerce was involved that the [*321*] Commission would be required to hold the statute inapplicable to that part of the system just where the line should be drawn, if at all, on the showing that will be made, we do not pretend to say at this time. But, obviously, the impact of the commerce clause of the Constitution on this particular

system is a matter of proof, whatever legal conclusion may be drawn from the facts thus proven.

Part IV of the answer is a seperate affirmative defense which relates primarily to time considerations. Section 11 of the Act requires the Commission to proceed under these sections "as soon as practicable". While these words are not further defined, we assume that in view of the reiteration throughout the Act of investor-consumer interest as the controlling guide of Commission action, that the phrase should read as though it said "as soon as practicable, having due regard to the interests of investors and consumers".

We suggest briefly in Part IV of the answer the considerations which are involved in the determination of investor-consumer interest. The incidence of the present World War, the disturbed conditions of financial markets, the demands of the National Defense Program, and finally, the steadily improving condition of the member companies in the system under their present control and management, and the necessity of preserving these sub-holding companies pending consideration of a definitive place of integration of operating utilities, [*322*] are briefly referred to as considerations bearing upon the timing of these proceedings, or any order which would require the dissolution or radical change of structure of companies in the system. Of some of these matters the Commission might perhaps take judicial notice, but brief testimony will be introduced to specifically direct the attention of the Commission to these problems.

We have given careful consideration to the order as well as to the content of proof. Subject to unforseen exigencies, we shall begin with the Electric Bond and Share Company which, while it is not presently threatened with elimination or change in its intracorporate structure, is necessarily vitally concerned in the determinations to be

made with respect to its immediate subsidiary holding companies.

We shall describe briefly its history, its development and its functions in the creation and maintenance of the system. We shall also give a brief preliminary view of the integration problem as bearing upon the future utility of both Electric Bond and Share Company and the three subholding companies in carrying out what we conceive to be the purposes of the Act. This will be followed by similar detailed description of the history, development, security acquisitions and holdings, further, of the subholding companies, National, American and Electric, in the order named. We shall then conclude with more specific testimony as to the function- [*323*] ing of the system at present and the development of the integration and coordination of its properties and future plans relating thereto, and such further general testimony applicable to the situation as a whole as will complete the case. . . .

MEMORANDUM

The transcript of testimony which follows covers over 18,000 (typewritten) pages and includes references to more than 2,000 exhibits received in evidence. In accordance with the stipulation of the parties, dated January 22, 1943, this testimony is omitted and the only remaining testimony printed is that of the closing days of the hearings. Such omission is without prejudice to either party to refer to the intervening pages of the transcript of testimony in accordance with the provisions of said stipulation.

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[*18258*] Mr. Calkins: I ask to have marked as Respondents' Exhibit 326 for identification, a document entitled "Before the Securities and Exchange Commission, in the

Matter of [*18259*] American Power & Light Company, File No. 54-37; motion to consolidate."

[Respondents' Exhibit 326 marked for identification.]

Mr. Calkins: Attached to this document which has been marked Respondents' Exhibit 326 for identification as Exhibit A, is an application under Section 11(e) of the Holding Company Act, for approval of a plan to enable the American Power & Light Company to comply with subsection (b) of Section 11 of the Holding Company Act.

Also attached is a copy of the proposed plan of reorganization referred to. I ask if Mr. Berman will stipulate that this application for approval and the plan, were filed with the Commission on July 23, 1941, and given file number 54-37?

Mr. Berman: I believe those facts are correct. I am not certain as to the precise date, but I think the date stated is substantially correct.

Mr. Calkins: There is no question but that these papers have been filed with the Commission.

Mr. Berman: As fas as I know, there is no question about it.

Mr. Calkins: Will you also stipulate that the motion to consolidate was filed with the Commission on December 6, 1941?

[*18260*] Mr. Berman: I believe that is correct, as well.

Mr. Calkins: I offer this document as Respondents' Exhibit 326.

Mr. Berman: Mr. Examiner, I will object to the admission of Respondents' Exhibit 326 on the ground that it has no bearing and is in no way relevant to the present proceeding. It is a document filed by the respondents in connection with a different matter and a different proceeding, and it refers to a motion coming before the Commission at the present time. There is no need for the respondents to

introduce it in evidence in this proceeding if they wish to refer to in it argument before the Commission or elsewhere with respect to this proceeding, because it forms part of the formal records and files of the Commission and it is before the Commission as a file. Accordingly, I object to its admission.

Mr. Calkins: I might call attention to the fact, Mr. Examiner, that throughout these proceedings it has been the practice of Commission counsel to offer as exhibits in the proceedings, all the formal orders and notices that have been issued by the Commission. They would be just as accessible for citation as this document, but he has seen fit to put his papers in as exhibits, and I think this should be marked as an exhibit.

Mr. Berman: This is not a pleading in the present pro- [18261] ceeding. It is a pleading in another proceeding. I have inserted only those documents which are part of the record of action of the proceeding before us now. You are seeking to introduce a document which is a pleading in another proceeding.

Mr. Calkins: This proceeding has been instituted under Section 11, and the present issue, in so far as American Power & Light Company is concerned, is whether American Power & Light Company should be dissolved. This plan which has been filed by American Power & Light Company with the Commission sets forth a proposal for the compliance with Section 11 of the Act, and I think that it is material and relevant in this proceeding.

The Examiner: Quite possibly it relates to Section 11; quite possibly it is a matter which the Commission will want to consider before it finally makes up its mind. It is quite probable. But, nevertheless, we are here restricted to this particular proceeding and not the power of the Commission or the action of the Commission. The hearing is restricted to 11(b) (2).

[Objection sustained.]

Mr. Calkins: I ask that an exception be reserved for action by the Commission.

The Examiner: Surely, it will be noted.

Mr. Calkins: I ask to have marked as Respondents' [*18262*] Exhibit 327-A, 327-B and 327-C for identification, respectively, a certified copy of excerpts from minutes of the board of directors of American Power & Light Company held on April 23, 1941, June 25, 1941, and July 23, 1941.

[Respondents' Exhibits 327-A, 327-B and 327-C marked for identification.]

Mr. Calkins: Before offering these documents as exhibits, I ask Mr. Berman if he will stipulate that he raises no objection to the fact that Mr. Jack, secretary of the company, has not been present to identify these excerpts from the minutes, and that if he had been present he would testify that the excerpts contained in these exhibits which have been marked for identification, are true and complete excerpts containing all the portion of the minutes of these meetings relating to the matters contained in such excerpts.

Mr. Berman: I raise no formal objection of the nature indicated by Mr. Calkins, and I will stipulate in the manner he has requested.

Mr. Calkins: Thank you. I now offer these three excerpts from the minutes of American Power & Light Company, the minutes of board of directors, as Respondents' Exhibits 327-A, B, and C.

Mr. Berman: Mr. Examiner, I will not object to the admission of these documents.

[*18263*] The Examiner: Admitted.

[Respondents' Exhibits 327-A, 327-B and 327-C received in evidence.]

Mr. Calkins: I ask that there be marked as Respondents' Exhibit 328 for identification, a copy of a letter dated

December 31, 1941, addressed to Milton Cohen, Esq., Attorney, Securities and Exchange Commission, and signed "J. F. MacLane".

[Respondents' Exhibit 328 marked for identification.]

Mr. Calkins: Before offering this letter as an exhibit, I ask Mr. Berman if he will stipulate that this letter correctly represents the substance of the conversation referred to in the letter, and that there was no dissent of record or otherwise to the statements contained in the letter.

Mr. Berman: Well, I don't think I should stipulate to that effect because I am going to object to the admission of the letter in evidence. Therefore, the stipulation as such would be meaningless. I am perfectly willing to say for the record that on December 31, 1941, counsel for American Power & Light Company conferred with counsel for the Public Utilities Division, and pursuant to a mutual understanding agreed not to urge immediate consideration of motions to consolidate [*18264*] the 11(e) plans of Electric Power & Light Corporation and American Power & Light Company, with the 11(b) (2) proceedings. I think that is the substance of what Mr. Calkins wants, and I am perfectly willing to have the record show that.

Mr. Calkins: Thank you, Mr. Berman. I offer this letter as Respondents' Exhibit 328.

Mr. Berman: I object to the letter. May I further state that certain portions of the letter have subsequently been superseded by other agreements of counsel, and that the letter no longer represents the accurate state of affairs with respect to this matter. I think the statement I made on the record gives Mr. Calkins what he wants, without bringing in a matter which is now inaccurate.

Mr. Calkins: I still ask that it be admitted.

The Examiner. Off the record.

[Discussion off the record.]

The Examiner: Objection overruled, I will admit it.

[Respondents' Exhibit 328 received in evidence.]

Mr. Berman: Will the record kindly note my exception to the admission of this document on grounds of irrelevancy and inaccuracy.

The Examiner: Certainly.

[*18265*] Mr. Calkins: I would like to call Mr. C. N. Phillips as a witness.

CALEB N. PHILLIPS,

recalled as a witness on behalf of the respondents, previously sworn, testified further as follows:

Direct Examination by MR. CALKINS:

Q. Will you kindly state your name? *A.* Caleb N. Phillips.

Q. Were you previously sworn as a witness in this proceeding on December 12, 1940? *A.* I was.

Q. At that time did you confine your testimony as to your engineering experience, to your familiarity with the physical properties of companies in the Electric Bond and Share Company system and the manner in which they are interconnected and operated? *A.* Yes, I did, as I was primarily testifying about the movement of power over State lines, I naturally emphasized that section of my experience at that time.

Q. Will you now describe in a general way your experience in construction and valuation of public utility properties? *A.* From the time of my graduation from Purdue University in 1908, until 1923, I actively followed my pro- [*18266*] fession in various sections of the country. In this time my work included estimates of cost, designs, economic studies and supervision in carrying out of construction on projects of a wide variety and kind. Since 1923 I have been associated with the Service Company of Electric

Bond and Share Company, and in that period of time I have taken part either in a direct supervisory capacity or consulting capacity, with the preparation of over a billion dollars worth in total amount of appraisals made by the Service Company, by the operating companies and by other engineers in various ways. My activities in this connection have been very largely subsequent to the year 1932, although they lap back into the previous period extensively.

Mr. Berman: May I interpose just on that point, Mr. Phillips?

Q. (by Mr. Berman): The appraisals you have referred to which you made as an engineer of the staff of Bond and Share or of Ebasco services and various subsidiaries of the Bond and Share system, were they the types of appraisals which were prepared either in connection with or in justification of, write-ups that were permitted in the plant accounts of these companies? A. No, sir.

[*18267*] Mr. Calkins: Pardon me, Mr. Phillips. Mr. Berman, I do not have any objection to your interrupting and asking some questions, but I don't think we should get into this controversial subject at this time.

Mr. Berman: Well, the witness is endeavoring to qualify himself and has mentioned that he has prepared appraisals involving over a billion dollars. Now, it seems to me the record ought to show what sort of appraisals they were, if Bond and Share engineers were sent out to bring back an estimate or appraisal showing the properties to be worth more than what they are on the books of predecessors, so they could be written up, that hardly, it seems to me, affords any basis for a claim of experience which would qualify this witness as an expert in appraisal work of a character which would be helpful in this proceeding or in any other proceeding. That is why I thought I ought

to ask the question at this time because it bears on his qualifications.

The Examiner: Let me ask, is that question pending?

Mr. Berman: I think it is.

Mr. Calkins: Yes, sir.

The Examiner: All right.

The Witness: I have never had anything to do in any way with any alleged write-up and no valuation that I was ever [*18268*] connected with had any bearing or relation to it. The valuations that I have been connected with either in a consulting capacity or the ones I have actually supervised, have been for the sole purpose of finding the true value of, or cost of the property, irrespective of whatever might be on the books of the company.

The Examiner: Were they to any considerable extent made before purchase or were they made after purchase?

The Witness: Most of the ones that I have made have been properties that were already a part of the so-called Bond and Share System. Some few of them have been made in connection with sales of the property by the Company, principally to Governmental bodies.

Q. (by Mr. Berman): Well, Mr. Phillips, didn't you have some connection with an appraisal made by the engineering staff of Bond and Share of the properties which went to form Florida Power & Light Company? *A.* I made no appraisal of any properties that went to form it. I was connected with an appraisal made for the so-called Florida rate case in 1934, which was a partial appraisal of part of the property.

Q. The Miami rate case? *A.* The Miami rate case.

[*18269*] Mr. Calkins: Mr. Berman asked about the appraisal when Florida was formed.

The Witness: No, I said I had nothing to do with any of those appraisals.

Q. (by Mr. Berman): How about the properties of Carolina Power & Light Company when that company was reincorporating in 1926 after consolidation and merger of a number of companies, weren't you active in connection with that venture? A. My activities in connection with that venture were the construction of several of the hydro-electric plants, including the exploration of it and making cost estimates of the plants and letting contracts, the actual carrying out of the work. I had nothing to do with the financial interest.

Q. You did not prepare an appraisal which was calculated to justify the write-ups which took place on the books of the company at that time, is that right, Mr. Phillips? A. I never recollect making any such appraisal to justify anything.

Mr. Berman: Very well.

Q. (by Mr. Calkins): Mr. Phillips, will you state what experience you have had in the determination of the earning power of operating public utilities? [*18270*] A. My experience in the construction and valuation of utility properties and my experience in their physical operations, which I have described, which I described when I first appeared as a witness in these proceedings, and my other duties as general consulting engineer for the Bond and Share Service Company, have required me to become familiar with all aspects of the operations and businesses of these companies. My duties as general consulting engineer have also required me to make numerous special economic studies dealing with the problems and operations of these companies. These studies, in many instances, cover a determination of the earning power of the properties based upon prevailing and anticipated conditions.

Mr. Calkins: I would like to ask Mr. Berman if he would stipulate that so far as relevant here, Mr. Phillips has qualified prima facie as an appraisal witness to testify to the

value of physical properties and earning power of the companies in the American Power & Light System, and that any cross-examination of Mr. Phillips as to his qualifications be deferred until after the relevancy of this testimony has been passed upon by the Examiner and the Commission.

Mr. Berman: I won't stipulate that he is qualified. I will stipulate that at this point I am not making an objection to his testimony on the grounds of competency, re- [*18271*] serving my rights with respect thereto.

Mr. Calkins: That is satisfactory.

Q. (by Mr. Calkins): Mr. Phillips, have you recently made a study of the reproduction cost new less depreciation of the major properties in the American Power & Light System, and the earning power of such companies? *A.* I have.

Mr. Calkins: I ask that there be marked for identification as Respondents' Exhibit 329 a schedule entitled "Summary of Valuation of Properties of Subsidiaries of American Power & Light Company."

[Respondents' Exhibit 329 marked for identification.]

Mr. Calkins: I ask that there be marked for identification as Respondents' Exhibit 329-A a tabulation entitled "American Power & Light Company, comparison between fixed property account per books and per reproduction cost of new principal subsidiaries as of December 31, 1941."

[Respondents' Exhibit 329-A marked for identification.]

Mr. Calkins: I ask that there be marked for identification as Respondents' Exhibit 329-B, a series of schedules each bearing the name of various subsidiaries of American [*18272*] Power & Light Company, and the sub-heading: "Comparison between statement of fixed property and

capital structure as of December 31, 1939, as adjusted in a Commission exhibit—" which is identified on each particular sheet—"and statement of fixed property and capital structure adjusted on the basis of estimate of reproduction cost new, less depreciation value as of December 31, 1939, and December 31, 1940."

[Respondents' Exhibit 329-B marked for identification.]

Mr. Calkins: I ask that there be marked for identification as Respondents' Exhibit 329-C, a tabulation entitled "Value of investment account of American Power & Light Company in terms of reproduction cost new, less depreciation of the subsidiaries as of December 31, 1941."

[Respondents' Exhibit 329-C marked for identification.]

Q. (by Mr. Calkins): Mr. Phillips, as a result of the study to which you have referred, have you formed a considered opinion of the reproduction cost new, less depreciation values, or other present values as of December 31, 1941, of the physical assets of the properties of the operating public utility subsidiaries of American Power & Light Company? *A.* I have.

[*18273*] Mr. Berman: Mr. Examiner—

Mr. Calkins: I am just asking if he has formed an opinion.

The Witness: I have.

Mr. Berman: Mr. Examiner, may I interpose at this point to ask Mr. Calkins whether it is his purpose to have Mr. Phillips express his opinion as to the values of the properties of the subsidiaries of American Power & Light Company, and as to the value of the assets owned by American Power & Light Company?

Is that the purpose for which Mr. Phillips is being produced here?

Mr. Calkins: Yes.

Mr. Berman: Do I understand that in general Mr. Phillips' valuations are based on reproduction cost new, of the properties of the American subsidiaries, as indicated by the exhibits you have marked for identification?

Mr. Calkins: That is correct, as well as the fact that he will present certain earning power testimony which bears upon the value of the properties.

Mr. Berman: And will it be the gist of his testimony, as indicated by Respondents' Exhibit 329-C, to establish that the value of the assets owned by American Power & Light Company at the present time based on reproduction cost new, [18274] exceeds $315,000,000 in Mr. Phillips' opinion, as compared with the $251,000,000, approximately, at which these assets are carried on the books of American at the present time?

Mr. Calkins: Well, without anticipating the exact figures, Mr. Berman, that is generally the effect of what Mr. Phillips will propose to testify to. May I call attention, Mr. Berman, to the fact that all I am asking Mr. Phillips now is if he has formed an opinion. I will proceed with a couple of questions where I think if you want to make your objection that will be a little better place to do it, because here I am only asking him if he has formed an opinion.

Mr. Berman: All right, proceed.

Q. (by Mr. Calkins): Will you answer that? *A.* I did.

Q. Have these schedules which have been marked Respondents' Exhibits 329-A, B, and C, been prepared under your direction, and do they reflect the results of your study of the valuation of the physical properties of the operating public utility subsidiaries in the American Power & Light Company system? *A.* They do.

Q. Will you kindly state separately for each company, [18275] your opinion of the reproduction cost new, less depreciation or other value determined, based upon your study as to such values?

Mr. Berman: Well, Mr. Examiner, of course at this point I want to interpose to continue the questions I had undertaken a few minutes, ago, in order that I may ascertain the nature of the testimony which it is proposed Mr. Phillips will give.

Q. (by Mr. Berman): Mr. Phillips, is it a fact that you arrived in your studies at an estimate of some $315,000,000 for the assets of American Power & Light Company, that is, the investment portfolio of American Power & Light Company, as shown on Schedule 329-C for identification? *A.* Yes, it is the value of the American Power & Light Company's interest in its subsidiaries.

Q. And that is a sum considerably in excess of the amount at which American carries these assets on its books, is it not? *A.* I so understand.

Q. And then you further carried forward your figures to show that on that basis the common stock of American Power & Light Company would have an equity of some $76,349,000, did you not? *A.* Yes, sir.

[*18276*] *Q.* And all this was based on reproduction cost new, appraisals made by you? *A.* Made not entirely by me, by myself and other engineers.

Mr. Calkins: I think, Mr. Berman, that Respondents' Exhibit 329 indicates that there are certain properties in which the value was based upon a different basis, representing a small percentage of the total, but they are not all reproduction cost values.

Mr. Berman: But most of them are?

Mr. Calkins: That is true.

Q. (by Mr. Berman): And the testimony that you are now preparing to give, Mr. Phillips, is caculated to justify the totals we have mentioned, and to explain how you arrived at them, is that right? *A.* That is right, sir.

Mr. Berman: Mr. Examiner, at this point I am obliged to object to any further testimony on the part of Mr Phil-

lips with respect to the valuation of the assets of American Power & Light Company. This is a proceeding in which the issues are whether it is necessary to require the dissolution of American Power & Light Company and other sub-holding companies, in order [*18277*] to simplify the structure of the Electric Bond and Share System, and to fairly and equitably distribute voting power among the security holders of that system, irrespective of whether the assets of American are worth $1.00 or worth $1,000,000,000. The question merely is as to whether the statute requires the dissolution of this company, and in that regard testimony as to the value of the company's assets has no relevance here. The question has already been presented to the Commission in another proceeding under Section 11(b) (2), and the Commission in that decision, namely, in the matter of Commonwealth & Southern Corporation, file No. 59-20, squarely ruled that expert valuation testimony is not relevant to the issues raised in an 11(b) (2) proceeding, and that the Commission in that proceeding ordered valuation testimony excluded.

[*18278*] In the present case it seems to me that the Commission's ruling would be a fortiori, because of all the types of valuation testimony most objectionable and least competent, certainly valuation testimony based on reproduction cost new heads the list. Even if the testimony were not irrelevant to the issues in the proceeding, I maintain it would be wholly incompetent in this proceeding. For these reasons and in line with the Commission's decision with respect to this matter, I object to the admission of this testimony and ask that no further testimony of Mr. Phillips, or anyone else along the lines of valuation, be admitted.

Mr. Calkins: This valuation testimony, Mr. Examiner, is offered for two purposes. First, it is offered as rebuttal for redirect testimony of the respondents, and is directed

at certain exhibits prepared and introduced by the Commission. It is also offered in support of the plan of reorganization which has been offered here this morning and at the present time has not been admitted.

Mr. Berman: Well, of course—

Mr. Calkins: May I finish first? With respect to the Commission's Exhibits, Mr. Berman has introduced a number of exhibits and sought to develop testimony as to alleged excessive capitalization of these companies, and his exhibits purport to make certain adjustments in these [18279] capitalizations based upon what may be termed original cost. I would also like to call attention to the fact that in a number of cases these exhibits which purport to suggest adjustments are based upon reproduction cost appraisals, and Mr. Berman has offered them in evidence himself. For example, Exhibit 203, which is the income tax questionnaire exhibit relating to the Kansas Gas and Electric Company, and was used by Mr. Berman as the basis for the amount of the adjustment to be applied to the accounts of the Kansas company. It has been called to my attention that this income tax questionnaire was not used as the basis of adjustment as to the Kansas Company. However, it has been offered and is in evidence for what it is worth, and I would like to point out that the amounts shown in this depreciation questionnaire, particularly the item entitled "Investments, property contracted for but not yet completed, etc.," was based upon an appraisal by Paine, McClellan & Campion in 1917.

Exhibit 216, which is the income tax depreciation questionnaire of the Pacific Power & Light Company, the same item was based upon an appraisal by W. J. Hagenah in 1912.

Exhibits 300-A, B, and C, which was the depreciation questionnaire relating to the Central Arizona Light & Power Company, the item which I have referred to was

based upon an appraisal by appraisers appointed by the Arizona Corporation [*18280*] Commission and the Pacific Gas & Electric Company in 1912.

Exhibits 275, 278, and 278-A, which are the depreciation questionnaires relating to the Florida Power & Light Company, the item in question was based, in so far as it related to the gas properties, on an appraisal by Hagenah & Erickson in 1924.

Exhibits 310 and 311, which were reports of Internal Revenue agents relating to Montana Power Company, the item in question was based on several appraisals by W. J. Hagenah in 1913, and 1920.

In addition there has been received in evidence as Commission's Exhibit 890, an appraisal of the Water, Gas and Electric properties of Superior Light & Power Company, dated December 31, 1938, by Black & Veatch, engineers, in Kansas City. Now, I think on this record as it stands now with these exhibits, that Mr. Berman has put in, that we are entitled to show what the reproduction cost values or other present values of the properties of the subsidiaries are today.

Turning to the second point, while the plan has not been received in evidence, it has been offered, and I assume will be passed upon by the Commission as to whether it will be admitted in evidence here. I think it is clearly material and relevant in order to show the fairness and equity of this proposed plan, that we be permitted to introduce this valuation testimony.

[*18281*] Mr. Berman: Mr. Examiner, I ask that I be permitted to reply to some of the contentions made by Mr. Calkins. As will be noted from an examination of Mr. Calkins' statements, the various reproduction cost new appraisals which have found their way into the present record, all form part of the records of the respondents filed with the Internal Revenue Bureau. None of them were of-

fered by counsel for the Public Utilities Division to establish the value of respondents' properties. We placed in evidence the depreciation questionnaire replies filed by the respondents with the Treasury Department, to show what their depreciation base was, and to show the inflation in their properties, and because they had used the reproduction cost new appraisals at certain points pursuant to the regulations of the treasury department, where their records were missing and couldn't be found. Certainly, it doesn't mean that we thereby endorse and offer as our testimony those reproduction cost new depreciation studies. On the face of it that claim is nothing short of preposterous.

Mr. Calkins: May I make one more statement?

Mr. Berman: I am in the middle of mine.

Mr. Calkins: I am sorry.

The Examiner: Proceed.

Mr. Berman: As to the claim that this testimony is offered in rebuttal of Commission counsel's exhibits intended to [*18282*] show that the capitalization of the subsidiaries of American are inflated, it appears we are getting into a vicious circle there because the proceedings started out with counsel for the respondents offering in evidence various exhibits calculated to show substantial values for the common stocks of their subsidiaries. As cross examination and rebuttal, Commission counsel placed in evidence these exhibits which show the inflated capitalization based on book values and true historical costs, all made up in accordance with the various systems of accounts to which the respondents are subject. Namely, the System of Accounts of the Federal Power Commission and of the National Association of Utility and Railroad Commissioners. Now, Mr. Calkins says that the respondents have to come forward and to rebut the Commission counsel's rebuttal there is to be introduced evidence based on

reproduction cost new for the various properties, which is based upon no accepted system of accounts, and which has been thoroughly discredited throughout the courts of the land and before all competent regulatory bodies today. It seems to me unnecessary to argue the point any further since this very question has been squarely presented to the Commission in another proceeding and has been passed upon by the Commission. I take it Mr. Calkins is merely trying to save his record for the Commission.

[*18283*] So far as his desire to introduce testimony which he says will be relevant to the 11(e) plans, obviously he cannot do that at this time in this proceeding until he has persuaded the Commission to permit him to consolidate the 11(e) plans with the present proceedings, something which, I venture to predict, will not take place. At any rate, until it has taken place, such testimony which may be relevant to that proceeding cannot be received in this one.

Mr. Calkins: I don't intend to continue the argument any further, but I would like to point out that in addition to the income tax questionnaire, Mr. Berman himself put in the Black & Veatch appraisal.

Mr. Berman: I put it in to show valuation, as you very well know, Mr. Calkins. I put it in for certain admissions that it contained with respect to write-ups on the books of the company, and not to establish value.

Mr. Calkins: It is in as an exhibit.

The Examiner: All right.

Mr. Berman: I suppose if I put in an exhibit to show that an officer of the company wrote on a certain date, making certain admissions, that thereby I offer that officer as my witness for all purposes and I am bound by everything he ever said in his life, is that right?

Mr. Calkins: I don't want to get into any argument.

[*18284*] The Examiner: Never mind discussing those questions any further. It is not a question so much of logic,

or even of law in itself, but if the Commission has passed on the admissibility of such testimony it seems to me that it is up to you to ask the Commission to reconsider the point; and that I am bound by what the Commission has to say. Now, unless you want to brief for me the point, what the Commission has said on this point, and not what the courts should hold, I must sustain Mr. Berman's objection.

Mr. Calkins: I ask that an exception be reserved for action by the Commission.

The Examiner: Oh, yes. Off the record.

[Discussion off the record.]

Mr. Calkins: At this time I would like to make the following offer of proof.

The Examiner: All right.

Mr. Calkins: If Mr. Phillips were permitted to testify he would testify in detail as to the study which he has made as a basis for his opinion of the reproduction cost new, less depreciation or other values, and he would testify that in his opinion such values of the various companies were as follows:

Big Bend Transit Company, $439,655. Central Arizona Light & Power Company, $19,404,908.

Florida Power & Light Company, and subsidiaries, $91,365,752.

[*18285*] Kansas Gas & Electric Company, $41,572,585.

Minnesota Power & Light Company, $66,196,267.

The Montana Power Company, and subsidiaries, $141,203,088.

Nebraska Power Company, $39,631,758.

New Mexico Electric Service Company, $962,783.

Northern Power Company, $717,492.

Northwestern Electric Company, $21,631,799.

Pacific Power & Light Company, and subsidiaries, $47,132,699.

Portland Gas & Coke Company, $28,106,169.

Superior Water, Light & Power Company, $7,338,373.
Texas Electric Service, $53,173,307.
Texas Power & Light, $85,550,367.
Texas Public Utilities Corporation, $1,774,225.
Topeka Land Company, $331,222.
Utilities Land Company, $701,000.
Washington Irrigation and Development Company, $303,700.

The Washington Water Power Company, and subsidiaries, $94,317,495, or a total of $741,854,644.

I might add that in several cases, and particularly the case of Texas Electric Service, detailed valuations are in the course of preparation and may show values higher than those shown by Mr. Phillips' study.

Mr. Berman: Mr. Examiner, at this point I move to [*18286*] strike from the record Mr. Calkins' so-called offer of proof on the grounds that it constitutes an attempt under guise of an offer of proof, to embody in the record testimony and figures which the Examiner has already ruled are not admissible. If Mr. Calkins wants to make an offer of proof he has to make it in such manner that he doesn't thereby circumvent the ruling of the Examiner as to the admission of the evidence, which has already been excluded. His offer should be in general terms as to the nature of the testimony he wishes to offer, and not an attempt to read into the record the precise figures he intends to justify. I move, first of all, that the offer of proof be stricken from the record in the form in which it was made.

Mr. Calkins: I think, Mr. Examiner, that we are clearly entitled to have in the record in our offer of proof, not only the nature of the testimony, but, after all, the results of the testimony.

The Examiner: Objection overruled.

Mr. Berman: Will the record note my exception, please?

The Examiner: Yes.

Mr. Berman: I now move, Mr. Examiner, that Mr. Calkins' offer of proof be rejected in line with your previous ruling.

The Examiner: Sustained.

Mr. Calkins: I ask that an exception be reserved for action by the Commission.

[18287] The Examiner: All right.

Mr. Calkins: At this time I would like to offer in evidence the tabulations which have been marked Respondents' Exhibits 329, 329-A, 329-B, and 329-C.

Mr. Berman: I, of course, object to the admission of those exhibits. It seems perfectly plain they cannot be admitted since they relate to the same matter concerning which the Examiner has refused the admission of testimony.

The Examiner: Anything further?

Mr. Calkins: No.

The Examiner: Objection sustained.

Mr. Calkins: I ask that an exception be reserved for action by the Commission.

The Examiner: All right.

Mr. Calkins: At this time I would like to make an offer of proof to the effect that if Mr. Phillips were permitted to testify he would testify in detail as to the manner in which these exhibits were prepared; that they were based upon his valuation study, and that the values shown on such exhibits represent his opinion based upon his valuation study.

The Examiner: You offer to show that?

Mr. Calkins: I made that offer of proof.

Mr. Berman: I claim that the offer is irrelevant.

The Examiner: All right, objection sustained.

Mr. Calkins: I ask that an exception be reserved for [18288] action by the Commission.

The Examiner: All right.

Mr. Calkins: I would like to state on the record that the tabulations contained in Respondents' Exhibit 329-B for identification, includes certain figures which are taken from Respondents' Exhibits, the particular exhibits being noted on each tabulation. These figures, of course, are in the form in which the exhibits are at present and do not give any effect to any suggested corrections which we made yesterday.

Q. (by Mr. Calkins): Mr. Phillips, based on your study of the values of the physical properties, and giving effect to other assets and liabilities, have you formed a considered opinion as to the reproduction cost new, less depreciation value or other present values applicable to the bonds, preferred stocks and common stocks of these companies, and the proportion of such values applicable to the securities of such companies owned by American Power & Light? *A.* I have.

Mr. Berman: Obviously, Mr. Examiner. I must object to that question as being irrelevant and immaterial in the light of your ruling excluding testimony based on valuation evidence.

The Examiner: I will overrule that objection and let [*18289*] him say whether he formed an opinion.

Mr. Berman: It is irrelevant as to whether he has or not.

The Examiner: Let him say it, anyhow.

The Witness: I have.

Q. (by Mr. Calkins): Will you state such values applicable to the securities of each of such companies owned by American Power & Light Company?

Mr. Berman: I press my objection, Mr. Examiner.

The Examiner: Objection sustained.

Q. (by Mr. Calkins): I ask that an exception be reserved for action by the Commission.

The Examiner: All right.

Mr. Calkins: At this time I would like to make the following offer of proof:

If Mr. Phillips were permitted to testify he would testify that based upon his study to which he has referred, the reproduction cost values applicable to the holdings of American Power & Light Company and such companies were as follows:

Big Bend Transit Company, $439,655.

Central Arizona Light & Power Company, $10,531,004.

Florida Power & Light Company, $22,887,390.

[*18290*] Kansas Gas & Electric, $16,343,157.

Minnesota Power & Light Company, $18,463,635.

The Montana Power Company, and subsidiaries, $74-362,829.

Nebraska Power Company, $11,527,540.

New Mexico Electric Service, $905,061.

Northern Power Company, $712,666.

Northwestern Electric Company, $10,033,715.

Pacific Power & Light Company, and subsidiaries, $20,-440,367.

Portland Gas & Coke Company, $9,035,000.

Superior Water, Light & Power Company, $6,311,519.

Texas Electric Service Company, $13,814,762.

Texas Power & Light Company, $33,322,060.

Texas Public Utilities Corporation, $1,765,364.

Topeka Land Company, $323,469.

Utilities Land Company, $716,828.

Washington Irrigation Development Company, $343,173.

The Washington Water Power Company, and subsidiaries, $63,233,169; a total of $315,502,363.

Mr. Berman: I move to strike Mr. Calkins' offer of proof because of the form in which it was made, based on similar objections made with respect to his previous offer of proof.

[*18291*] The Examiner: Motion denied.

Mr. Berman: I take an exception. I now move that Mr. Calkins' offer of proof be denied.

The Examiner: Objection sustained.

Mr. Calkins: I ask that exception be reserved for action by the Commission.

The Examiner: All right.

Q. (by Mr. Calkins): Mr. Phillips, have you also carried your study forward by substituting for the investment account of American Power & Light Company, as shown by its books, the reproduction cost values applicable to the bonds, preferred stocks, and common stocks of these companies which are owned by American Power & Light Company, and thus determined the value on a reproduction cost basis applicable to the debt, preferred stock, and common stock of American Power & Light Company?

Mr. Berman: Objected to as irrelevant.

Mr. Calkins: I ask him if he had carried his study forward.

Mr. Berman: It is of no interest as to whether he has or not, since clearly his opinion cannot be admitted here.

The Examiner: I will let him say whether he has formed an opinion.

The Witness: I have.

[*18292*] *Q.* (by Mr. Calkins): Will you state the reproduction cost values shown by your study, which is applicable to the debt, preferred stock, common stock of American Power & Light Company?

Mr. Berman: Objected to as inadmissible.

The Examiner: Objection sustained.

Mr. Calkins: I ask that exception be reserved for action by the Commission.

The Examiner: All right.

Mr. Calkins: At this time I would like to make the following offer of proof. If Mr. Phillips were permitted to testify he would testify that the reproduction cost values

applicable to the securities of American Power & Light Company which are outstanding and are as follows: American's interest in the subsidiaries on a reproduction cost basis substituted for its investment account, $315,502,363, to which should be added cash and cash items $9,733,795. United States, State, Municipal and other securities, $8,723,425. The difference between current assets and other debit items and current liabilities, $499,337, a total of $334,458,920. Applying these values to the security of American they would be applicable to the long-term debt $45,849,000; applicable to the preferred stock $177,145,326; applicable [*18293*] to preferred stock dividend arrearages $35,114,788, and the remainder for common stock of American Power & Light Company, $76,349,806.

The Examiner: The offer is made.

Mr. Berman: I move to strike the offer of proof from the record because of the form in which it was made on the grounds previously stated for the prior offers.

The Examiner: Overruled.

Mr. Berman: I take an exception. I now move that the offer of proof be denied.

The Examiner: Objection sustained.

Mr. Calkins: I ask that an exception be reserved for action by the Commission.

The Examiner: All right.

Mr. Calkins: At this time I would like to offer as Respondents' Commission 329-C the tabulation which has been marked Exhibit 329-C for identification.

Mr. Berman: I object to its admission on the grounds previously urged with respect to the other exhibits.

The Examiner: Objection sustained.

Mr. Calkins: I ask that an exception be reserved for action by the Commission.

The Examiner: All right.

Mr. Calkins: I would now like to make an offer of [*18294*]

proof to the effect that if Mr. Phillips were permitted to testify that he would testify this exhibit was prepared under his direction; that the values shown on the exhibit were determined as the result of his study and that the exhibit represents his opinion as to the matters indicated.

Mr. Berman: Mr. Phillips has already testified to that. He already testified that he prepared them and they represent the results of his study, and they represent his opinion.

Mr. Calkins: My statement goes further than that, Mr. Berman.

The Examiner: Off the record.

[Discussion off the record.]

The Examiner: Objection sustained.

Mr. Calkins: I ask that an exception be reserved for action by the Commission.

The Examiner: All right.

Q. (by Mr. Calkins): Mr. Phillips, turning to the earning power section of your study, will you describe briefly the basis upon which it was made?

Mr. Berman: I object, Mr. Examiner, on the ground that this is further valuation testimony which is not admissible in this proceeding in line with the ruling of the Commission [*18295*] in the Commonwealth & Southern Corporation proceeding.

The Examiner: Objection sustained.

Mr. Calkins: Mr. Examiner, I am not asking him any figures, I am merely attempting to explain the study and how it was prepared.

Mr. Berman: Why waste time since it is not admissible?

The Examiner: Off the record.

[Discussion off the record.]

Mr. Calkins: Mr. Examiner, I would like to point out that Mr. Phillips' study is based upon two parts, first, its reproduction cost values; secondly, it is the earning power

of subsidiaries. They say you can not use reproduction cost. What about earning power? That is what we are going to show now, and what I am doing is explaining the study which Mr. Phillips made so that anyone looking at the exhibits will have a proper understanding as to how these exhibits were prepared. I am not asking him any figures.

The Examiner: The Commission will not look at the exhibits unless you persuade the Commission to take a different position from what it has taken in previous cases.

[*18296*] Mr. Berman: The Commission did not exclude testimony in the Commonwealth & Southern Corporation case merely on the grounds that it was reproduction new testimony. In fact, I am not sure that it was in that case. It excluded it on the grounds that valuation testimony, whether based on earnings or anything else, is irrelevant. I merely added that where it is based on reproduction cost new, it is incompetent as well as irrelevant. Where it is based on earning power, it is still valuation testimony and it is still inadmissible.

Mr. Calkins: May I suggest this is not valuation testimony.

Mr. Berman: What is it? Statistics as to earnings?

Mr. Calkins: Testimony as to the probable earning power of these companies.

Mr. Berman: What do you call that if not valuation testimony?

Mr. Calkins: It is only the testimony as to earnings to be used in considering the value of the securities. I think there is quite a difference.

Mr. Berman: I think you are playing with words. Obviously, you are trying to introduce testimony as to the earning power of these companies as bearing on their value to American Power & Light Company, and if that is not [*18297*] valuation testimony, I don't know what it is.

Mr. Calkins: Mr. Examiner, I insist this is not valuation testimony, and that there should be a distinction drawn between testimony of this nature and what I have previously offered.

Mr. Berman: May I ask what is the alleged relevance of these statistics you want Mr. Phillips to give as to his opinion of what these companies make here? What is its relevance in this proceeding?

Mr. Calkins: I thought the Commission and the Commission staff contended the earning power was the one criterion to be considered in determining the value of securities of a public utility.

Mr. Berman: The one to be considered in determining the value of securities of a public utility, and a moment ago you were saying this was not valuation testimony. I am at a loss to understand your point.

Mr. Calkins: I am merely putting before the Commission or attempting to put before the Commission, figures with respect to the earning power upon which the Commission may make a determination as to the values.

Mr. Berman: The Commission has no occasion to make a determination of values in the present proceeding. The respondents, if they want to try to reorganize their companies, [*18298*] have to obtain the permission of the Commission to permit proof to be adduced as to their 11(e) plan or some other reorganization plan. The Commission is not interested in the present proceeding, as it has indicated in a similar proceeding, with the entire question of valuation.

Mr. Calkins: Mr. Examiner, this proposed testimony is directed to the plan which has been offered this morning.

Mr. Berman: The plan has been refused admission. Therefore, the testimony must be refused admission.

The Examiner: The objection was sustained.

Mr. Calkins: I ask that an exception be reserved for action by the Commission.

The Examiner: All right.

Mr. Berman: At this time I make the following offer of proof. If Mr. Phillips were permitted to testify he would testify in detail as to the manner in which he made his study of the earning power of the various subsidiaries in the American Power & Light Company system, and the amount of the earnings of such companies available to the securities owned by American Power & Light Company. I offer to prove that based on Mr. Phillips' study he would testify that the income available to American Power & Light Company from its subsidiaries on the basis of actual revenues and expenses for 1937 through 1941, by giving [*18299*] effect to conditions prevailing December 31, 1941, and based on Federal income tax rates prevailing in 1938 and 1939, would have been as follows: For the year 1937 the amount available to American would have been $13,889,498—

Mr. Berman: May I interpose; what is the basis of this testimony?

Mr. Calkins: I am making an offer of proof.

Mr. Berman: I would just like to understand what the proof is calculated to show, that if income taxes were now what they were four years ago, something else would follow? I would just like to get clear on it as you go along. Will you enlighten me on that subject?

Mr. Calkins: I will let you read this. You evidently were not listening to what I stated on the record.

Mr. Berman: Well, I did catch some strange word. Proceed, Mr. Calkins. I am not sure that I understand even what it is that Mr. Phillips would attempt to prove, but I think you might as well make your offer.

Mr. Calkins: May I suggest that I try to have Mr. Phillips explain on the record just the kind of a study he made, but that the testimony was not permitted to be introduced?

Mr. Berman: That is perfectly true because it has no [*18300*] relevancy.

Mr. Calkins: 1938, $12,424,965; 1939, $14,210,455; 1940, $15,985,677; 1941, $18,140,916; or a total of $74,651,511, to which should be added other income of $375,000, or a total of $75,026,511. And that after provision for interest for your preferred stock dividends, operating expenses and taxes of American Power & Light Company, there would be available for the common stock and other corporate purposes of American Power and Light Company for the 5-year period 1937 to 1941, $9,873,361.

Mr. Berman: I move to strike the offer on the ground that its form is improper; on the ground that I can think of nothing better calculated to confuse the record.

The Examiner: Objection overruled.

Mr. Berman: I move that the offer be denied.

The Examiner: Objection sustained.

Mr. Calkins: I ask that an exception be reserved for action by the Commission.

The Examiner: All right.

Mr. Calkins: I ask to have marked for identification as Respondents' Exhibit 330, a series of schedules, the first of which is entitled "Earning Power of Subsidiaries of American Power & Light Company as it relates to American Power & Light Company situation," to which is attached a [*18301*] number of supporting schedules.

[Respondents' Exhibit 330 marked for identification.]

Q. (by Mr. Calkins): Mr. Phillips, does this series of schedules which has been marked Respondents' Exhibit 330 for identification, was it prepared under your direction and does it show the results of your study as to the earning power of the various companies in the American Power & Light Company system and the amount of earn-

ings available to American Power & Light Company? A. It does.

[18302] Mr. Calkins: I offer this series of schedules in evidence as Respondents' Exhibit 330.

Mr. Berman: Mr. Phillips, are you an accountant?

The Witness: Not by profession. I have had a great deal of experience in accounting.

Mr. Berman: Have you ever been employed as a financial analyst?

Mr. Calkins: I thought you weren't going to object to his qualifications.

Mr. Berman: I thought he was to testify as an engineer concerning reproduction cost new. Now, it turns out that he is a financial analyst who can analyze earnings and produce expert testimony as to adjusted earnings and readjusted earnings, et cetera, of the entire American Power & Light system. However, I will not press that objection in view of the fact that I, of course, object to the admission of this exhibit on the grounds that it is entirely irrelevant to the issues in this proceeding.

The Examiner: Objection sustained.

Mr. Calkins: I ask that an exception be reserved for action by the Commission.

The Examiner: All right.

Mr. Calkins: At this time I will make the following [18303] offer of proof. If Mr. Phillips were permitted to testify he would testify in detail as to his earning power study, and that this series of schedules, which has been marked Respondents' Exhibit 330, was based upon his study of the earning power, and that the figures set forth therein represent his opinion as to such earning power.

Mr. Berman: These offers of proof are getting somewhat cumulative.

The Examiner: Do you object?

Mr. Berman: Yes, sir.

The Examiner: Objection sustained.

Mr. Calkins: I ask that an exception be reserved for ruling by the Commission.

The Examiner: All right.

Mr. Calkins: As shown by Respondents' Exhibit 329 for identification, Mr. Phillips accepted for the purpose of his study certain appraisals of other engineers and the respondents are prepared to produce the following engineers who made the appraisals for the following companies, to testify in detail in support of their appraisals. Benjamin L. Smith representing Whitman, Requardt and Smith, who made an appraisal of the properties of Central Arizona Light & Power Company. Cecil F. Elmes, who made an appraisal of the going value of Florida Power & Light [*18304*] Company. Harry Street, assistant first engineer of the Florida Power & Light Company, who made an appraisal of the water property in Coral Gables, Florida, owned by a subsidiary of the Florida Power & Light Company. Douglas C. Black, a valuation engineer of Minnesota Power & Light Company, who made an appraisal of the properties of that company. Ralph E. Davis, who made an estimate of the present value of oil and gas reserves of subsidiaries of the Montana Power Company. Nathan Thomas Veatch, Jr., representing Black & Veatch, who made appraisals of the properties of Nebraska Power Company, Northern Power Company and Superior Water, Light & Power Company. Louis R. Howson, representing Alvord, Burdick & Howson, who made an appraisal of the properties of the Washington Water Power Company. T. D. Thomas, who made an appraisal of the properties of New Mexico Electric Service Company. Ernest C. Willard, who made an appraisal of the properties of Northwestern Electric Company, Pacific Power & Light Company and Portland Gas & Coke Company. At this time I would like to ask Mr. Berman if he will stipulate that these

engineers whom I have named would, if present, qualify prima facie as appraisal witnesses, and would offer to present detailed testimony in support of [*18305*] their appraisals of the respective companies whose properties were appraised by them, in accordance with the amounts incorporated in the exhibits which have been marked 329, 329-A, B and C for identification; and to stipulate that if these witnesses were present and were presented as witnesses, the same rulings would be made by the Examiner as to the relevancy of the valuation testimony offered by them, as was made with respect to the proposed testimony of Mr. Phillips; and that respondent's counsel might reserve an exception for action by the Commission, and that respondent's counsel may make appropriate offers of proof with the same effect as though these witnesses had been present at the hearings and asked the necessary questions to present their issue as to the relevancy of their testimony.

Mr. Berman: I am willing to stipulate that the absence of these engineers should in no way be detrimental to the respondents. That was the purpose of our arrangement, and accordingly I am willing to have the record indicate that if these gentlemen had appeared they would have sought to give testimony along the lines indicated by Mr. Phillips, and incorpoated in his schedules. I hope that the Examiner would have made the same ruling with respect to that testimony, and its irrelevancy [*18306*] and incompetence, as he did to Mr. Phillips.

Mr. Calkins: And that I might be considered to have the same exceptions?

Mr. Berman: As far as I am concerned it may be so indicated.

Mr. Calkins: For the purpose of the record I would like to make a formal offer of proof that if these witnesses whom I have named were permitted to testify with respect

to the appraisals which they have made as to these companies, they would testify in detail as to the manner in which they made these appraisals and that as a result of their appraisals they had reached a determination of the reproduction cost accepted by Mr. Phillips, and incorporated in his exhibits.

Mr. Berman: All of them use reproduction cost as the basis of their appraisal, is that right, Mr. Calkins?

Mr. Calkins: That is my understanding, Mr. Berman.

Mr. Berman: I object to the receipt of the offer.

The Examiner: Objection sustained.

Mr. Calkins: May I have an exception reserved for ruling by the Commission?

The Examiner: All right.

* * * * * *

[*18324*] Mr. Berman: Will counsel stipulate that where the record contains filings made by the respondents with this Commission, and where subsequent filings have been made by the respondents, that the subsequent filings can be referred to with the same force and effect as though they had been formerly received in evidence in this proceeding?

Mr. MacLane: That refers principally, although not [*18325*] exclusively, to the U-5-S's for 1940 and 1941?

Mr. Berman: That is the type of thing I had in mind, Judge.

Mr. MacLane: Yes, subject to the proviso that the source of any such material shall be identified and the material so identified shall become a part of the record, if any review is had.

Mr. Berman: That is agreeable. And, can we also stipulate that with regard to minute books of the various respondent companies and transcripts of ledger accounts, all of which are bulky and voluminous, that figures or statements contained therein may be referred to by either side,

and that any such material thus referred to shall be identified and become part of the record for the purposes of review?

Mr. MacLane: Yes, that, of course, Mr. Berman, covers the formal filings which the companies have made in accordance with the specific requirement of the law or some specific order of the Commission?

Mr. Berman: No, I had in mind now, Judge, the fact that we have received statistics of the minute books of all the companies which are very huge and voluminous, and which I have not sought to introduce in evidence here. I want to arrange that either of us can refer to them for any particular fact or statement by making it part of the record in the manner prescribed.

[*18326*] Mr. MacLane: But, those are the papers which have been furnished by this respondent subject to your request, and the papers which respondent is responsible for.

Mr. Berman: All of them are the documents furnished by this and the other respondents. I wanted the stipulation to cover the minute books of Electric Bond and Share and investment ledger of—

Mr. MacLane: I should have said respondents in this case.

Mr. Berman: Is that agreeable, Judge?

Mr. MacLane: Yes, that is all right.

Mr. Berman: Do I understand that you have another witness at this point?

Mr. MacLane: Yes, sir.

Mr. Berman: May we have just a minute's recess before Mr. Aller goes ahead?

The Examiner: Yes, all right.

[Short recess.]

H. L. ALLER,

recalled as a witness on behalf of the respondent, having been previously sworn, testified further as follows:

Direct Examination by Mr. MACLANE:

Q. Mr. Aller, you have given your name to the reporter? *A.* Yes, sir.

Q. You have been previously sworn and have testified [*18327*] in this case? A. Yes, sir.

Q. And you are the president of the American Power & Light Company? *A.* Yes, sir.

Q. There has been identified here the Respondents' Exhibit for identification No. 326, a document entitled "Motion to consolidate in the matter of American Power & Light Company, applicant, File No. 54-37, and in the matter of Electric Bond and Share Company, American Power & Light Company, and other companies, File No. 59-12" having attached thereto as exhibits an application under Section 11(e) of the Public Utility Holding Company Act of 1935, by American Power & Light Company, for approval of a plan of compliance with Section 11 of the Act, and of the plan itself, proposed by American, and the company schedules and exhibits. Are you familiar with this document? A. I am.

Mr. MacLane: I believe it is stipulated, or I think Mr. Berman will stipulate, that that document was filed in this proceeding on the 6th day of December, 1941, as identified by a receipt signed by Mr. James Hindle, Chief of the Docket Section.

Mr. Berman: I will acknowledge, Judge, that it [*18328*] was filed with the Commission at that time. I don't know whether it can be said to have been filed in this proceeding.

Mr. MacLane: Will you admit the authenticity of that or do you want me to bring in Mr. Hindle?

Mr. Berman: I will admit it, Judge.

Mr. MacLane: I will ask that there be identified as Respondents' Exhibit No. 326-A, a copy of receipt by Mr. Hindle, Chief of the Docket Section, acknowledging the filing of this motion.

Mr. Berman: I object to the receipt of the—

Mr. MacLane: I have not offered it, I have asked that it be identified.

Mr. Berman: No objection.

[Respondents' Exhibit No. 326-A marked for identification.]

Mr. MacLane: I show this document to Mr. Berman, and ask whether he will agree without my calling Mr. Hindle, that this is a true copy of the receipt, and may be offered with the same force and effect as though it were the original.

Mr. Berman: Judge, I will do more than that, I will obviate the necessity of your offering the document at all by admitting that the motion was filed with the Commission, as I already have admitted.

Mr. MacLane: Would you kindly answer my question, Mr. [*18329*] Berman, I asked you whether you will admit the authenticity of this document?

Mr. Berman: I raise no question as to the existence or the authenticity of Mr. Hindle's signature, Judge.

Mr. MacLane: Will you agree that this is a copy of the document?

Mr. Berman: I don't dispute it for a moment.

Mr. MacLane: Will you agree that this is a copy of the document?

Mr. Berman: I don't dispute it for a moment.

Mr. MacLane: Accepting that as an agreement, I offer this document in evidence as Exhibit No. 326-A, and it is to meet the point which Mr. Berman seems unwilling to

admit, that this matter has been filed in No. 59-12, which is this proceeding.

Mr. Berman: No objection to the admission of this document.

The Examiner: Admitted.

[Respondents' Exhibit 326-A received in evidence.]

Mr. MacLane: Now, I wish to renew the offer of Exhibit No. 326 for identification, which was made this morning, and which I understand was rejected. I wish to call attention to the fact in this connection, that every document filed [*18330*] in this proceeding, including the original notice and order, and every document filed subsequent thereto, has been received in evidence and given an exhibit number. I do not assume that that was necessary, but, however, it is the practice here and I therefore request, and with such vigor as I have, insist that this document be received in evidence.

Mr. Berman: Mr. Examiner, if it makes any difference to anybody, I have no objection to its coming in.

The Examiner: Admitted.

[Respondents' Exhibit 326 received in evidence.]

Q. (by Mr. MacLane): Mr. Aller, I symbolically hand you this exhibit number, Respondents' 326, and will ask you to state if you recall on what day the plan which is attached to that exhibit, and the application for its approval, was filed with this Commission? *A.* It was filed on July 23, 1941.

Q. Will you state the origin of this plan? *A.* The plan originated following discussions between myself and counsel John F. MacLane during the course of my cross-examination in this proceeding in March, 1941. At that time we discussed the matter generally, and finally [*18331*] formulated the substance of a plan which I requested counsel to set forth in such shape so that we could present it to our board of directors. This counsel did.

Q. I hand you herewith Exhibit No. 327-A of the respondents, introduced into evidence this morning, which purports to be a certified copy of excerpts from minutes of the board of directors' meeting held on April 23, 1941. Was that the first meeting at which the substance of this plan was discussed with the directors? A. Yes.

Q. Do those minutes set forth with substantial accuracy the substance of the action which was taken at that time? A. Yes, they do. Of course, counsel explained the purposes, intent and details of the plan as then proposed, and there were a number of questions asked by members of the board, and there was a general agreement reached as to the lines which the plan should follow. Counsel was then instructed to go ahead and polish the document up.

Mr. Berman: Well, Mr. Examiner, I have hesitated to interpose objection to this line of testimony, merely in an effort to find out where it was going. But, it seems to me to be of the utmost irrelevance to this proceeding, and I [18332] move to strike the entire line of questioning and the answers with regard thereto. In other words, I cannot see what difference it makes to us here why Mr. Aller decided to file a plan and how he and his directors went about the drafting of it; what they said to counsel and counsel said to them. What is the significance of that?

Mr. MacLane: Well, Mr. Examiner, I may say, in response, first, that this testimony will be very brief. It will take very much less time to offer than it will to go through the formality of making offers of proof, and so forth. And, it would seem to me that it would be perfectly proper for counsel to state his objection and move to strike the testimony and let the Commission decide whether it had any relevance or not, at the proper time. But, passing that for the moment, which suggestion counsel may adopt, or not, as he sees fit, I want to call attention to two phases of this question. The first is that it is, and will be the contention

of this respondent, which is for the Commission to decide and cannot be decided here, that this plan is directly responsive to the issues tendered in this proceeding, whether motions to consolidate were ever made, or not. In other words, the issues as defined by the notice and [*18333*] order here, are simply whether the corporate existence of American Power and Light Company should be terminated. One answer is, and a perfectly good answer, that it is not necessary to terminate the corporate existence of American because it not only can be reorganized, but has proposed that it be reorganized to conform to this law. So that the reasons, if any, for the termination of its corporate existence, would not longer exist. Second, there has been filed here and just admitted in evidence, this motion to consolidate. This motion to consolidate is pending before the Commission. It has not been set for hearing. I understand that Mr. Berman stated this morning that an agreement had been reached by which the matter would be tendered to the Commission. That is correct, isn't it, Mr. Berman?

Mr. Berman: Yes.

Mr. MacLane: Therefore, this very brief testimony which will not take over fifteen minutes, is pertinent and should be of some assistance to the Commission in the determination of this motion. As to all, counsel's rights of objection may be preserved in the manner that I suggest, and I submit if there is any doubt in your mind as to the relevancy of this testimony, that doubt should be resolved in favor of admitting it.

[*18334*] Mr. Berman: Mr. Examiner, all that the Judge has said seems to me to simmer down to the fact that he thinks a legal argument can be made, that because the respondents have filed a plan to reorganize American, therefore it is no longer necessary to order the dissolution of American. Perhaps there is force to that argument and perhaps there is not. As Judge MacLane knows, I think

there is none whatever. But, we are not to argue it out here. That is a matter for the Commission to decide. I don't think that it is a subject for the taking of testimony. I have no desire to constrain the Judge unduly, and if you decide to grant his request to permit this statement to come on the record, I think it should be with the understanding that it is in the nature of preliminary argument on the motion to consolidate or some such thing, and not in the nature of evidence; and that I have taken a running exception to his entire line of testimony.

The Examiner: Off the record.

[Discussion off the record.]

The Examiner: All right.

Q. (by Mr. MacLane): I hand you Respondents' Exhibit No. 327-B, which was admitted in evidence this morning, which purports to be a certified copy of the minutes of the meeting of the board of [*18335*] directors of American, on June 25, 1941. Can you identify it as such? A. Yes.

Q. Does that correctly represent, according to your recollection, the action taken at that meeting? A. It does.

Q. While it is probably not important, I notice that that was the June meeting. You hold a monthly meeting, do you not? A. Yes.

Q. Why was there no further presentation of the matter in May? A. Well, I was in the Northwest for about a month, and was there during the time of the regular May meeting. And, during that time there was some further revisions being made to the proposed plan. I recall having talked on long distance to counsel about it during my absence. The plan was not ready for submissi to the board until about the time of my return, which was just prior to the date of the June meeting. Therefore, the plan was not considered at the May meeting.

Q. I note by these minutes that a committee was appointed consisting of Messrs. Frost, Ericson and Bauer, to

consider the plan in detail. Can you describe those [*18336*] gentlemen very briefly with particular reference to whether they had any contacts with Electric Bond and Share Company system other than as directors of American? *A.* All three of them were directors of American and had been for some years. They had no connection whatever with the Electric Bond and Share Company and were not affiliated with it in any way, and never had been. Mr. Frost was, and still is, a partner in W. A. & A. N. White & Company, of New York, and he and his associated interests own 41,450 shares of $6 preferred stock; $5,500 principal amount of debentures, and he personally owns 100 shares of common stock and 100 shares of the $6 preferred stock. Mr. Ericson is the president of the S. W. Childs Management Corporation. His associated interests have large holdings in American. They own 11,000 shares of common stock; 5,000 shares of $6.00 preferred stock; 625 shares of $5.00 stock, and $345,000 principal amount of debentures. Mr. Bauer is a retired investment banker. He has relatively small holdings, all of common stock, owning 100 shares of common stock. He is at the present time connected with the War Production Board in Washington. But, none of these gentlemen had had any affiliation whatever with Electric Bond and Share Company, and they [*18337*] were selected by the board to review the proposed plan as set forth in those minutes.

Q. Did they carry out that direction? *A.* Yes, they conferred with each other, discussed the matter with me, and I understand took the matter up with counsel and reported favorably on the matter at the next meeting of the board.

Q. I hand you herewith what purports to be a certified copy of the minutes of the meeting of the directors of American, held July 23, 1941, which has been introduced in evidence as Respondents' Exhibit 327-C. Does that cor-

rectly reflect the action taken in that meeting? *A.* Yes, it does.

Q. That meeting was held on July 23, which was the day of filing of the plan. How was that accomplished, the meeting being in New York and the filing taking place in Washington? *A.* Immediately following the meeting, which was about 12:30, I think, when the meeting adjourned, a messenger was dispatched to Washington by plane to file the plan.

Q. Why the hurry? *A.* It was felt by the board that it would be unjust to stockholders to have such an important matter reach them through the channels of rumor or through the press, and that it would be highly desirable to send a notice to [*18338*] stockholders immediately following the action of the board. Of course, we couldn't send such a notice without the plan having been filed. The letter addressed to stockholders was ready for mailing and was released immediately after the filing of the document. It was in order to protect stockholders in their interest, to give them as prompt notices as possible, that that document was filed the same day the action was taken by the board.

Q. By the way, had the directors, that is, all members of the board, received copies of the final draft of the plan as agreed upon between the committee and yourselves, any substantial time before the meeting of July 23rd? *A.* Yes, sir, between the meeting of June 25th and July 23rd, as soon as the agreement had been reached by the committee and the plan finally typed up, the copy in typed form was furnished to all the directors several days before the meeting at which action was taken.

Q. Now, there are two or three questions about the plan itself I want to ask you which are, perhaps, not apparent on the face of the plan. Why does the plan not specifically designate the single integrated system which it was pro-

posed should be retained by American Power & Light Company? A. There were two reasons for this which seemed [18339] important at the time. In the first place, at that time it was my understanding, and I had been informed by counsel, that there had been no orders or opinions handed down by the Securities and Exchange Commission sufficiently clarifying the questions that had been raised concerning the interpretation of Section 11(b). There had been advanced many interpretations of that section, and it was subsequent to the filing of this plan that the Commission handed down its first order which gave to us an idea of what properties we might be expected to retain with the approval of the Commission. That order was the Engineers Public Service Company order. They went in great detail into the question of the second system, and the incidental properties that might be owned. And the question as to whether the second or additional systems must of necessity be in a State adjoining the principal system or whether they could be in other parts of the country, disassociated from that central system. Then the second reason was that American has a number of properties which are situated in the proximity of Federal projects where substantial movement is on foot directed toward public ownership of utilities. It was not certain at that time just how far this movement would go in these sections, and it was felt desirable that no definite [18340] action be taken by American on that point until the matter developed further. It was, of course, contemplated that provided it was determined by the Commission that American had the right to select its own system or if counsel felt that American had the undisputed right to select its own system, or if the Commission desired American to select its own system, American would, by amendment to the plan, make such an election at the proper time.

Q. The primary reason, then, for not making the elec-

tion at that time, was to keep the plan sufficiently flexible to await the determination of some of these disputed issues? *A.* That is correct.

Q. The plan does not propose any specific recapitalization or distribution of stock between the present five and six dollar preferred and the common. Why was no definite provision made for that? *A.* It was felt by the directors that they should not attempt in the first instance, or at least not at that time, to make such a determination. It was felt that inasmuch as the Commission had the power and right to adjudicate the matter in the final analysis, that the Commission might, in the first instance, indicate what it considered to be a [*18341*] proper apportionment of values between these various classes of stock. It was felt that inasmuch as this was to be a voluntary plan it would require substantial support on the part of the various classes of stockholders, some 90 per cent, I believe, of the preferred stock, and 50 per cent of the common stock would have to agree to the plan. It was therefore felt that it would be desirable to have large groups of these stockholders, or stockholders representing a large amount of stock, at least, agree as to some proper distribution of the reclassified stock among the various classes of stockholders of American. It was, of course, felt that if the directors should at that time propose a definity of allocation of values between the various classes of stock, that attention would be focused on that particular matter and controversy would arise with respect to it and detract from the merits of the plan as a whole. It was therefore felt desirable that the plan be not definite in that respect at that particular time.

Q. Would it be your intention that that matter should also be fixed by amendment to the plan at the proper time? *A.* Yes, it is our intention that that would be covered by an amendment to the plan and that the values which would

[18342] be fixed in such amendment would be determined in some one of the manners that I have indicated above.

Q. Do you regard this reclassification of stock as essential to any reorganization of American, or even to its dissolution? *A.* Yes, I regard it as highly essential. If American Power & Light Company is to be either reorganized or dissolved, the reclassification of stock will permit American to distribute values without wasting of those values, as would result if it were compelled to liquidate through a substantial sale of properties. It was felt that the sale of properties should be limited to as small an amount as necessary to facilitate the satisfaction of the debt of American.

Q. Was that particularly true in view of the present unsettled economic and other conditions? *A.* Yes. The war condition has made the markets for securities and common stocks, much poorer than it was even at the time when the plan was filed. But, it was felt that the conditions were such even in 1941 that great values would be lost unless some such plan of reclassification of stock were followed out.

Q. What means do you and the directors have in mind for satisfying American's debt, as represented by the out-
[18343] standing debentures? *A.* American has in its portfolio some ten and a half million dollars of debentures of the Montana Power Company. It has some two and a half million dollars of debentures of the Northwest Electric Company, and $5,000,000 of bonds of the Texas Power & Light Company. All of these securities would be salable at a good price today, in my opinion. It has, in addition to that, some $15,000,000 cash and certain properties which would not be a part of the integrated systems, could be sold, and sufficient proceeds obtained to retire the full debt of American.

Q. The amount of that full debt is somewhere around $47,000,000? A. That is correct.

Q. What would be the effect of the adoption of the plan under the relations of American to Electric Bond and Share and its system? A. Electric Bond and Share Company, upon the reclassification of the stock, would be affected. It would undoubtedly have its voting proportionate strength reduced. Electric Bond and Share Company owns approximately 3 per cent of the preferred stock of American, and about 30 per cent of the common stock.

Q. Pardon me, 20 per cent, isn't it? [*18344*] A. 30 per cent.

Mr. Berman: 30 per cent is right.

The Witness: 30 per cent.

Q. (by Mr. MacLane): Oh, that produces about 20 voting? A. 20 voting. If the stock is to be reclassified as proposed in the plan, and the arrearages of the preferred stock are to participate, then on undoubtedly the preferred stock will have voting control after such reclassification. Electric Bond and Share Company, as stated, has but a small percentage of the preferred stock. Whether Electric Bond and Share Company would continue to be a holding company or an affiliate of American Power & Light Company, supposing the reclassification of stock, of course, would depend upon the quantitative amount of stock issued to Electric Bond and Share under this plan. The disposition of the holdings of Electric Bond and Share Company, of course, is a matter which would be a problem for the Securities and Exchange Commission, not a problem of American Power and Light Company.

Mr. MacLane: If Mr. Berman, particularly, will bear with me, this is my last question.

Q. (by Mr. MacLane): I do not want to go into any length in the [*18345*] question of economic justification of the plan, that is a matter, I think, for later determination.

[18346] But, I believe the plan sets forth about four integrated systems, or what are claimed to be integrated systems, which consist of more than one company. Those would be the Northwestern, the Texas, the Kansas-Nebraska, and the Minnesota-Superior groups. Do you believe the view expressed in the plan that those properties are so integrated, if I may use the term, in their operations that they should be kept together by some form of corporate connection after the application of this act to American? *A.* It seems to me highly desirable that the properties in the Northwest remain under one control, and the same thing applies to the properties in Texas. Likewise, the Minnesota and Superior companies are so interconnected in their operations and the economy of their operation is so interwoven, that it is highly desirable they remain under one control and ownership. The Nebraska-Kansas situation is exactly the same. Those companies are inter-connected and substantial economies flow from a continuance of their close relationship, as exists under a common ownership.

Q. And regardless of what the name of the company was which kept these different groups together, you believe that those four groups should severally each be kept together [18347] as integrated systems? *A.* I think that they each should be in a system. And I assume that you mean by "the name" that irrespective of whether they are retained by American in any particular instance, that they should be continued in a group, and that is so.

Mr. MacLane: That is all, thank you.

Mr. Berman: Mr. Examiner, at this time in line with my other statements, I move to strike Mr. Aller's entire testimony as irrelevant, and in no sense evidence in the case, and only self-serving statements of one kind or another.

Mr. MacLane: I suggest that motion be reserved for action of the Commission.

Mr. Berman: Then, if the motion be not granted, I

would like to ask Mr. Aller a few questions, if I may, with respect to his testimony.

The Examiner: All right.

[18348] *Cross Examination* by Mr. BERMAN:

XQ. You lay considerable stress on the fact that the three directors who were appointed a committee of some kind to make an analysis of the draft of the plan before it was submitted were not and never have been connected with the Electric Bond and Share Company; was that the substance of your testimony? *A.* That is correct.

XQ. Now, Frost, you said, was a member of the firm of W. & M. White? *A.* W. A. & A. M.

XQ. W. A. & A. M. White, who are investment bankers, are they not? *A.* No, that is not so.

XQ. Well, tell us who W. A. & A. M. White are? *A.* It is a family holding company of the White family.

XQ. And what was the White family? *A.* It is the White family of New York. Mr. Harold White is one of the members of the family. It was his father that was prominent in the Washington Water Power Company. The White family owned a substantial amount of stock in the Washington Water Power Company and received preferred stock of the American Power & Light Company in exchange for that stock.

[18349] *XQ.* Well, that W. A. & A. M. White Company, or the members of the White family, had had a brokerage and investment banking business for many years, had they not? *A.* Mr. Frost had never been a member of that family.

XQ. Would you be good enough to tell me whether it is true that the White family had been identified with a banking firm or brokerage firm of approximately the same name as this company you have mentioned? A. No, not the same name at all.

XQ. What was the name of it? *A.* I do not know their

name through history. There is a firm name White Weld & Company, I think the name is now.

XQ. And the Whites for whom this W. A. & A. M. White Company is named were partners in that White Weld & Company at one time, were they not? *A* Possibly some of the members. I do not know enough about it.

XQ. And as a matter of fact, the White Weld & Company, or its predecessors, had had intimate relations with Bond and Share in connection with the financing of some of the Northwest properties of the Bond and Share system, running way back in time, is that not true, Mr. Aller, for example, Pacific and Portland? *A.* I do not recall having heard of White Weld being [*18350*] an underwriter of any securities of Portland or Pacific. It may very well have been that they had some interest in it, but it was not a relationship sufficiently prominent to have ever been brought to my attention, sir.

XQ. And you do not recall having discussed in the course of testimony respecting Pacific and Portland that the White Weld & Company received a large amount of the securities sales business of those companies? *A.* No, I do not.

XQ. Now, the fact is, is it not, that in 1928 Bond and Share entered into negotiations with the Whites whereby a plan was consummated under which the common stock of the Washington Water Power Company was exchanged for preferred stock of American Power & Light Company, and it was pursuant to that arrangement that the firm of W. A. & A. M. White procured the greater part, if not all, of its present holdings of American securities? *A.* It may very well have been that White Weld participated in the transaction under which the exchange of preferred stock of American was made for the common stock of the Washington Water Power Company.

XQ. The Whites owned the controlling interest in the Washington Water Power Company, which was transferred

to American pursuant to that transaction, is that not true? [18351] *A.* I do not know that they did own a controlling interest and I do not think I have ever testified to that effect, sir.

XQ. I think you have, Mr. Aller. *A.* I do not think I have, Mr. Berman.

XQ. Now, Mr. Frost, at any rate, is a partner in the firm of W. A. & A. M. White, which we have thus identified, is he not? *A.* That is correct.

XQ. Now, Mr. Ericson, you say, is associated with the S. W. Childs Management Company? *A.* Yes, sir.

XQ. Will you tell us who S. W. Childs was? *A.* S. W. Childs was, when active, a director in some of the American companies or in American itself—certainly in some of the Bond and Share affiliates. Mr. Childs, I believe at one time was a director of American, but I am not certain, sir, and I will have to look up the record. It was not for a long time, if he was.

XQ. Prior to 1935? A. Oh, Yes.

XQ. At a time when there was no question about the fact that Bond and Share controlled American? *A.* I do not quite understand you.

[18352] *XQ.* At the time Mr. Childs was a director of American, there is no question in your mind, is there, Mr. Aller, that Bond and Share was in control of American? *A.* There is no question in my mind that Bond and Share is in control of American today, sir. We have admitted it.

XQ. I am glad to hear you say that, Mr. Aller. Now, the fact is that Childs was related to a prominent official of the General Electric Company, is that not true Mr. Aller? *A.* By marriage.

XQ. He was a son-in-law, was he not, of Coffin, who was chairman of the board of General Electric? *A.* That is correct.

XQ. And General Electric, until 1925, was the parent

company and the controlling company of Electric Bond and Share Company? *A.* That is correct.

XQ. So that would you think it quite accurate to say that Ericson, who represents the Childs interests on the board of American, has never had any connection with Bond and Share, in view of that fact that he— *A.* He never had had any connection whatever with Electric Bond and Share Company. He now represents certain [*18353*] estates and management firms. I do not think he knows anybody in the Electric Bond and Share Company or has ever met them.

XQ. Well, let us put it this way: Mr. Ericson may not have been connected with Bond and Share, but the interests which he represents, namely, the Childs interests, do have and have had a long period of association with Bond and Share and General Electric?

Mr. MacLane: There ancestors had. This is ancestral affiliation. It is a new form. It has just been created for this particular purpose, at this particular time.

Mr. Berman: Well, the Chinese spirit, Judge, is very much in the news today.

Mr. MacLane: If we can accept your interpretation of history, Mr. Berman, you and I are related, because we both link through a common ancestor.

Mr. Berman: Well, Judge, I may have you declared a holding company as to me one of these days.

XQ. (by Mr. Berman): When did Mr. Bauer come on the board, Mr. Aller? *A.* I think about four years ago.

XQ. You said he was a retired banker. With what bank had he been affiliated before he— *A.* I said investment banker.

XQ. Very well, what investment bank had he been [*18354*] affiliated with before his retirement? *A.* An investment banker is not necessarily connected with a bank, sir.

XQ. Was this gentleman connected with a bank, or was he

not? *A.* Mr. Bauer was a member of the firm of Bauer, Pogue.

XQ. Now, in view of the fact that, as you said a few minutes ago, Electric Bond and Share Company controls American, you will agree, I take it, that Electric Bond and Share Company selected Mr. Bauer to take a position on the board of American, is that not so? *A.* They did not happen to select him in the first instance. They have elected him, or furnished the vote which went a long way toward electing him at the most recent stockholders meeting.

XQ. All right. Well, then, these three gentlemen whom you have termed non-affiliated with Bond and Share and especially selected because of that non-affiliation, were the ones who were most directly in charge of analyzing and approving the plan which you have filed? *A.* That is correct.

XQ. Now, Mr. Aller, was it the feeling of the board [*18355*] of directors and your own feeling that this plan should be filed here from a desire to cause American Power & Light Company to conform with the requirements of the Public Utility Holding Company Act of 1935? *A.* Definitely the plan sets forth and it was the definite opinion and intention of the members of the board that this plan would be filed and that the plan itself would enable American to comply with the standards and provisions of Section 11(b) of the Holding Company Act, both as to sub-section (1) and sub-section (2).

XQ. Was that what motivated the board and yourself in the filing of this plan, or did you have some other motive, Mr. Aller? *A.* No motive other than that whatever, sir.

XQ. Is it not a fact, Mr. Aller, that you filed this plan and your board filed this plan because it believed that if it failed to follow this plan, and it had been advised by counsel that if it failed to file this plan, it faced the prospect of an order of dissolution by the Commission entered in the present

proceeding? *A.* The various possible alternatives with which American was confronted, namely, the possibilities of contesting orders of the Commission on the one hand or of complying with the Act on the other hand, were certainly discussed and [*18356*] considered, and as one of the possibilities before us was an order of dissolution which might be handed down by the Commission or there might be an order handed down under 11(b) (1) proceeding that would require dismemberment of the American system because all of the properties were not entered into one system, it was felt that the values inherent in American's system could be preserved to American stockholders much better if American should file a plan which would permit it to conform to the Act, and in it was a desire to conserve those values for American security holders that the plan was filed.

XQ. Then it is correct to say, Mr. Aller, that the plan was filed in order to avoid the entry of an order of dissolution in the present proceeding? *A.* It was certainly felt that if American did file such a plan the Securities and Exchange Commission would see the merit in that plan and would see that no order of dissolution would be necessary, and we felt that the Commission would see that these values could be preserved under the plan much better than they could through any order of dissolution.

XQ. That is as responsive an answer as you can give to my previous question, is it, Mr. Aller? *A.* I think it gives the thought of what was in the minds of the directors very fully, sir.

XQ. Now, is it not a fact that at this meeting of the [*18357*] directors of April 23, 1941, an excerpt from the minutes of which you have placed in evidence as Respondents' Exhibit 327-A, counsel for American came before the board and, discussing the pending 11(b) (2) proceeding, and your testimony with respect to it, confirmed the estimate you had given that this proceeding would have only

about 60 days more to run before its conclusion and that your counsel advised the board that a pre-emptory order of dissolution was a contingency which should be based and which the company should be prepared to meet if it should occur, and then counsel stated that in view of this contingency the directors should give serious consideration to the formulation of plans or programs which might be adopted in such event, that is, in the event of dissolution, and an outline of what such plans or programs might involve? Now, is it not a fact that that meeting and that report of counsel to the board with respect to the eminent termination of the 11(b) (2) proceeding and the possible outcome of it was the genesis of the plan which has been filed by you?

Mr. MacLane: Well, if there had not been any Act we would not have filed any plan to conform to the Act.

Mr. Berman: Judge, my point is that there was an Act for six or seven years before which required you to conform to it, and it was not until you had a proceeding for a year and a [18358] half, and your confirming to the directors that it had only 60 days more to run that these gentlemen bestirred themselves to file a plan.

XQ. (by Mr. Berman): Now, Mr. Aller, in this plan that you filed, is it correct to say that the plan makes no definite provision for the retirement of the outstanding long-term debt of American Power & Light Company; it makes no provision for number of shares of new stock to be issued by American Power & Light Company in the prospective reorganization, nor in what manner that stock will be allocated among the various classes of security holders; it makes no election as to what alleged system of American will be retained; and it makes no provision whatever for severing control of American from Bond and Share—all those things are true, is that not so? *A.* It makes no provision with respect to the debt except in general terms to say

that debt will be retired in some form, either through exchange of securities or through payment of cash.

XQ. Excuse me. No specific provision, though, is made—*A.* No definite provision as to how much cash would be paid for the retirement of debt. In fact, sir, at that time we did not even know how much we would have to pay for the retire- [*18359*] ment of debt. It is since that time that there have been several orders of the Commission, which had been to the effect that on a compulsory retirement of debt, under this sort of proceeding, the payment of premium would not be required.

XQ. Excuse me. But your plan purports to be a voluntary plan of compliance, Mr. Aller, and not a compulsory one, so that that factor may never enter into the matter. *A.* It may still. It is possible that there might be an application to the court, of course.

XQ. At any rate, no provision—*A.* And that would make it compulsory.

Then, in discussions with the staff of the Commission, it had developed that possibly debt should be retired by the delivery of tickets similar to the tickets, you might call them, that, that would be used in the reclassification of stock. It was felt that there would be a development of the views of the Commission within a few months or a short time following the filing of the plan which would permit us to present to the Commission concrete plans for the retirement of the debt and the distribution of the stock and the selection of a principal system, all by amendment to the plan which is contemplated.

XQ. Now, with respect to that matter of the principal system, you stated that you did not know at the time you filed [*18360*] the plan what interpretation the Commission was going to give to B of Section 11. Now, the fact of the matter is that the Engineers Public Service Company decision came out on July 23, 1941, is it not? *A.* I would like

to correct that. The release came out on the 24th, so we could not have known about it.

XQ. All right, one day after you file your plan. A. That is correct.

XQ. Did you proceed by amendment then to designate which of your alleged systems you elected to retain? A. We have not even had any indication that the Commission would give serious consideration to the plan up to this time. About a month following the filing of the plan—and that is a month following the issuance of the Engineers Public Service Company order—I came to Washington and interviewed the staff with respect to the plan and asked that it be given consideration and that I be given an opportunity to come down and discuss it. I was advised at that time that the plan was under consideration by the staff, that a report would be prepared in due course, and that it would be useless to try to discuss the matter until that report was completed. [*18361*] Then a month later I called again and asked if it was time for me to come down and discuss it and was advised that the report had not been given full consideration, that I would be informed when the Commission's staff desired to talk with me about it. I have not been informed since that time.

XQ. In view of the fact that a year has gone by since that time, Mr. Aller, have you never gained the impression that perhaps the staff was not highly impressed with your plan? *A.* I gained the impression that the staff was not highly impressed with many very good things.

[*18362*] *XQ.* At any rate, this is one of the good things that you gained the impression it was not impressed with, is that right? *A.* I have not discussed the matter with any member of the Commission's staff at all since about the 1st of September, 1941, at which time the Commission told me that they would call me when they were ready to discuss

the plan, and therefore, I am not in a position to say what the Commission's staff thinks about the plan.

XQ. You are aware, are you not, that your counsel has had discussion with counsel for the Division for the last nine or ten months and that at all times the impression has been conveyed to him that this plan was not regarded seriously by the staff of the Commission, as far as the staff was concerned, are you not? *A.* My counsel has never told me that this was not being considered seriously by anybody.

XQ. All right.

The fact of the matter is, is it not, Mr. Aller, that practically one year has elapsed since the time you filed that plan, one year has elapsed since the date the Commission's position has been made clear as to the meaning of B of Section 11, but no amendment has been filed by you (a) either as to the system you elect to retain, or [*18363*] (b) as to the manner of allocation of the stock among the various classes of security holders, or (c) as to the manner or time of the payment of the debt; all that is true, is it not? *A.* That is true.

XQ. Now, Mr. Aller, the plan makes no provision whatever, does it, for the severance of control by Bond and Share of American? *A.* No plan presented by American can ever provide for the severance of control by Electric Bond and Share, as I understand the matter.

XQ. Well, let us see whether that is true. For example, does the plan suggest that immediately upon the effective day of the reorganization the present management of American and the directors, all of whom owe their offices to Electric Bond and Share Company, will resign and set up machinery for the election of new people in no way affiliated with Electric Bond and Share Company? That is a provision the plan could make for the severance of control. Does it do it? *A.* Do you mean on the date when there would be a reclassification of stock, or on a date—

XQ. (Interposing) At any given date. Pick your own date. Does it provide it will do it any time? [*18364*] *A.* It will automatically take care of itself. It seems to me it would be highly immaterial whether the election took place at the date of the final disposing of the property or when American elected to retain its particular system. Bond and Share will have a vote in the American system. It will have some measure of voting power after a reclassification, and I have stated I do not know what that will be. I can not do anything about it. This Commission will have to do something about it.

XQ. Well, you can do something about the ousting of yourself and your associates from office and the setting up of machinery for the election of a new management and directorship which does not have possession of the proxy machinery, such as the present management does, can you not, Mr. Aller? *A.* We could have a new election of officers. There will be such an election of officers—

XQ. (Interposing) I am not talking about an election, sir. I am talking about the divorcement of the proxy machinery and the ousting and sterilization of the present management and directorship which represent Bond and Share control. Does the plan make any provision for that at any time? *A.* Certainly it makes no provision for the sterilization [*18365*] of the management.

XQ. I think I will agree that it should be so, Mr. Aller. Now, the fact of the matter is, is it not, Mr. Aller, that this plan neither makes provision nor in any sense furnishes assurance that American Power & Light Company when reorganized will not continue to be under the control of Electric Bond and Share Company? *A.* I can not see how these parcels of properties which now constitute the American Power & Light Company can, by any stretch of the imagination, be considered to be under the control of the

Electric Bond and Share Company after this reorganization is effected.

XQ. Well, now, Mr. Aller, you are familiar with the testimony which was offered in evidence here this morning by counsel for your company, Mr. Calkins, through a Mr. Phillips of Ebasco Services, and which purports to show a value of something like $315,000,000 for the investment securities owned by American, are you not? *A.* I am familiar with the offer of proof made by Mr. Calkins and know that that constituted an offer with respect to the physical values underlying the assets of American Power & Light Company.

XQ. It went further. It purported to establish a [*18366*] value for those assets on an earnings basis, as I understand, and reached the conclusion that the assets of American are reasonably worth $315,000,000 aside from the company's cash and current receivables? *A.* On the assumptions that were made therein.

XQ. You do not agree with those assumptions, I take it? *A.* I do not quarrel with them, and I have not analyzed them so meticulously as to be able to stand cross examination with respect to them. If you would like to cross examine somebody about them, I am sure that Mr. Phillips can be brought here.

XQ. No, I think the underlying facts are perfectly plain. However, what I want to ask you is this: Have you ever figured out what percentage of American securities Bond and Share would emerge with in a reorganization if Mr. Phillips' contentions as to the value of American's assets are established? *A.* Well, I have not, nor have I any idea that any proposal made by anyone in the organization of Electric Bond and Share Company would be, of necessity, the proposal that would be finally accepted by the stockholders of all classes in American Power & Light Company.

XQ. Was Mr. Phillips a witness for Electric Bond and [*18367*] Share Company? *A.* No, I did not say so.

XQ. Who is paying Mr. Phillips? *Q.* I am paying Mr. Phillips.

XQ. And he was your witness? *A.* That is right.

XQ. And he, on behalf of your company, attempted to present testimony that the value of the company's assets exceeds $315,000,000. Now, what I want to ask you, Mr. Aller, is whether it is not true that on that basis Electric Bond and Share Company would emerge with close to 10 per cent of the voting securities of the reorganized American? *A.* I do not know, sir. I have not figured it out. I would like to say this, that it was because of feeling that instead of considering the plan and its full merits the discussions would resolve immediately by all stockholders to the question of the relative recovery that each class was to have, and that is the issue that you are raising now instead of constructively analyzing the plan as such.

XQ. Mr. Aller, I am trying to make two points in my questioning of you. The first is that it does not seem to me that you have a plan, since the so-called plan omits all [*18368*] the essential elements of a plan. The second point I am trying to make is that you will agree, will you not, that the plan makes no provision whatever for severing Bond and Share's present control over American, either by assuring that Bond and Share will have so small a proportion of voting securities that it can exercise no effective voice in American or by assuring that the present management and directors of American who were placed in office by Bond and Share will be removed from office and non-affiliated persons placed in office, and no provision is made for the severance of the service contracts between all the American subsidiaries and Ebasco Services, a wholly owned subsidiary of Bond and Share; none of those things are provided for in the plan, are they? *A.* Well, it was a pretty long question,

but let me begin at the end of it and we will see if we can hit the various points. In the first place, Ebasco Services—this plan of American Power & Light Company provides for the severance of most of these properties with American Power & Light Company, and possibly the severance of all of them from American Power & Light Company.

XQ. In the event it dissolves? *A.* There may be possibly a dissolution.

[*18369*] *Q.* Well, then, we have no problem, of course. *A.* I say possibly a dissolution. It has the right under the Act to retain one of those several systems. Now, those several systems are a group of properties in the Northwest, one in Texas, one in Nebraska-Kansas, and the little Minnesota-Superior group. It claims that it would have the right to retain one of those systems at least. We did not know prior to July 23, 1941 what the Commission's position would be with respect to a second one of those systems.

XQ. Well, you have known since July 23, 1941? *A.* We have known that there was an order in that case, which order, as I interpret it, would not permit American to possess the Northwestern system and the Texas system. I am not altogether certain that it would not permit American to retain the Texas system and the Kansas-Nebraska system. Maybe it would permit that. Probably it would permit that. It certainly would not permit the retention of Florida or Arizona. It probably would permit the retention of New Mexico. That is very small. Now, if it retained one of those properties, all the rest of them would have to go, and when it goes it is foolish for me to say, having distributed this to the 34,000 stockholders of American Power & Light Company, that I am going [*18370*] to require that company to guarantee that they will never employ Ebasco Services in whatever form Ebasco Services may take in years to come. I have nothing to do with it. It is not my

concern. They are going to be their own rooster. So, it is foolish for me to put in a plan a provision that when all these companies are separated from our system, that they will not be serviced by Ebasco Services.

XQ. Well, how about the retained companies? *A.* Well, it is possible that it will be found desirable to dissolve American entirely. That would depend upon the tax questions and other legal questions as to whether the company itself is the particular corporate organization that you would want to have so continue to function.

[*18371*] There is a question of American Power & Light Company's assumed debentures, the Southwestern Power & Light Company debentures, which are not callable at this time. It may be possible for one of these succeeding companies to assume that debt, or it may be found desirable to have American continue in some form with that obligation, which is a relatively small obligation. However, as to Bond and Share, that is hardly, in my opinion, a proper subject for the plan. As to the other matters, namely, the definitive plan for retiring the debt, the definitive election of a system, and the definitive program for reclassification of the stock, I have told you that all those should be subjects for amendment to the plan, and whenever we get to a point where the Commission's staff would indicate to us that they will sit down and constructively consider the plan with us we will be in a position to intelligently file such amendments.

XQ. Well, then, you do not think it will be more accurate to describe the amendments you have referred to as the prospective plan, rather than the document you have filed? *A.* Not at all.

XQ. You might term the document you filed an intention to file amendments which would be a plan? *A.* That is a rather foolish way to express it.

XQ. I am glad to see a flash of your old spark and [*18372*] fire, Mr. Aller.

Mr. Berman: Those are all the questions I have of Mr. Aller.

Mr. MacLane: I was not present this morning, but I understand from Mr. Calkins that certain testimony was introduced or an agreement was reached with the counsel that by reason of certain discussions and negotiations between counsel for the company and for the staff of the Commission the American was not to be charged with any laches for not having heretofore urged its motion to consolidate and have a hearing upon this plan.

Mr. Berman: Well, a letter was placed in evidence, as I understand it, Judge, and I did agree that at some time towards the end of December you and counsel for the Division agreed that the matter would be held in abeyance.

Mr. MacLane: And you will agree with me that the matter has been under active discussion for the last two or three months between you, as counsel for the Commission, and myself, as counsel for the company, as to a method of presenting the problem to the Commission?

Mr. Berman: Judge, I will exonerate you of all laches subsequent to December, 1941, but for all the laches between December, 1941, and November, 1935, I cannot exonerate you.

[*18373*] Mr. MacLane: I will assume my share of that responsibility, but in view of the duty imposed upon the Commission I shall ask that it share that responsibility with me.

Mr. Berman: Whatever is an equitable arrangement on that, Judge.

Mr. MacLane: Now, Mr. Aller, I have just one question, which involves a matter, perhaps, of personal privilege.

Redirect Examination by Mr. MacLane.

Q. You have employed counsel entirely uncontaminated by its employment by any other member of the Bond and Share system to represent American in the presentation and consideration of this plan, if it can ever be presented? *A.* We have employed counsel which is not employed by any of the affiliated or associated companies in the Electric Bond and Share system.

Q. And counsel for Electric Bond and Share Company will have no responsibility for the presentation or working out of that plan if it is considered? *A.* It is our intention that the firm of Root, Clark, Buckner & Ballantine will represent American Power & Light Company in connection with its reorganization plans with the Securities and Exchange Commission.

Mr. MacLane: That is all.

Mr. Berman: Is this an attempt to note the appearance [*18374*] of new counsel in this proceeding, Judge?

Mr. MacLane: No, sir.

Mr. Berman: Merely to place on the record the fact that at some point new counsel will appear?

Mr. MacLane: I assume full responsibility for the continuance and conclusion of this proceeding, and as I understand it, no other counsel will be employed in this proceeding, unless some unforseen contingency arises, except as and in connection with an incident to the consideration of this plan of reorganization, if we can secure consideration of the plans.

Mr. Berman: Well, I do not know what relevance that statement of Mr. Aller's has, but if you—

Mr. MacLane: There has been so much emotional and ancestral and other forms of affiliation here that I wanted to exclude the lawyers from the family.

Mr. Berman: Still leaving the president affiliated, however.

Mr. MacLane: Does this conclude the hearing?

Mr. Berman: I think it does, Judge, and I think we ought to proceed now with the statement that we had prepared.

Mr. MacLane: Well, for the sake of the record, Mr. Examiner, and in accordance with an understanding reached with Mr. Berman, I wish to reiterate and reaffirm that the motion to dismiss, which was filed on the ninth day of September, 1940, and was offered and received in evidence as Respondents' [*18375*] Exhibit No. 2. I believe the transcript of proceedings on that day, beginning on page 304, shows that it was understood that the taking of testimony would not be delayed for the argument of that motion at that time, but that the motion would be reserved for presentation at the conclusion of the hearings. Therefore, I now and here formally renew that motion at the close of the case on all the grounds stated in said motion and reserve the matter for formal presentation to the Commission. I also reserve, for the same reasons, the document entitled "Statement by Respondents' counsel on objections to exhibits and parts of exhibits," introduced in evidence on the ninth day of September, 1940, and which was similarly reserved for Commission action at the conclusion of proceedings, and that document was labelled Respondents' Exhibit No. 1. I may say, with respect to that particular motion, that there has been such a wealth of evidence, verbal and documentary, that the motion sort of pales into insignificance at this time.

[*18376*] However, I would like to consider the matter further and reserve that for Commission ruling. I also wish to expressly reserve for Commission ruling the question of the exclusion of testimony and exhibits at various times during the hearing which was reserved for ruling of the Commission and specifically the questions presented by the rulings on objections and exceptions thereto with respect

to value testimony offered in evidence this morning. We give notice before closing this record that those questions as well as the motion to consolidate the proceedings relating to the plan are reserved for ruling of the Commission, and any agreement to close the record is subject to such rulings as the Commission may make on any of those matters.

Mr. Berman: Mr. Examiner, of course I have reserved only the right to file the document which was discussed earlier, and the record shows that. At this time, I wish to state the substance of an agreement which has been reached by counsel for the Division and counsel for the respondents with respect to the closing of the record in this proceeding, so far as it relates to the respondent, American Power & Light Company. It is understood that the record in the above-entitled proceeding shall be determined closed so far as it relates to American Power & Light Company, subject to [*18377*] such order or orders as the Commission may enter with respect to the reserved issues stated on the record a moment ago by Judge MacLane. Hereafter, counsel for the Public Utilities Division shall proceed to draft a proposed "findings and opinion" and order of the Commission with respect to the issues in the above-entitled proceeding as respects respondent American (without prejudice to inclusion in such "findings and opinion" of findings with respect to any other respondent in the present proceeding relevant to the issue as defined in the Commission's order of June 7, 1940). Not more than 25 days after such copy has been served, counsel for American shall file with the Commission such exceptions to said proposed "findings and opinion" and order and such requests for additional findings as they desire, and may file a brief in support of such exceptions and requests. Not more than 15 days thereafter, counsel for the Public Utilities Division shall have the right to file such reply or other briefs as they desire.

The Commission shall issue its final "findings and opinion" and order upon the basis of the record of the proceeding, the tentative "findings and opinion" and an order described above, respondents' exceptions thereto, and [*18378*] requests for additional findings, and the briefs of both sides, and after hearing such oral argument as the Commission may authorize; provided that the Commission may order such further proceedings as it may determine with respect to the disposal of the issues resulting from rulings of the Trial Examiner on exclusion of evidence, or from pending motions reserved for the Commission's decision; all such matters being specifically identified on the record as requiring Commission ruling. Counsel for American Power & Light Company stipulate that they waive a trial examiner's report and the filing of proposed findings of fact and conclusions of law, other than as specified above. Does Judge McLane stipulate that the statement just read is agreed to by American Power & Light Company?

Mr. McLane: Yes, sir.

Mr. Berman: And you are authorized, I take it, Judge, to stipulate on behalf of associate counsel Reid & Priest, of record in this proceeding?

Mr. McLane: Yes, sir.

Mr. Berman: Counsel for the Public Utilities Division likewise so stipulates.

Mr. McLane: I wish to add, Mr. Berman, so that there may be no misunderstanding not by way of either amendment [*18379*] or modification, that we are stipulating as to a form of procedure for the closing of this record and are expressly reserving all rights to judicial review of matters of substance involved in the proceedings.

Mr. Berman: That is my understanding, Judge.

Mr. McLane: Off the record.

[Discussion off the record.]

The Examiner: Anything further?

Mr. McLane: It is customary to thank the Examiner for his careful and courteous attention, and not only customary, Mr. Examiner, but I wish to express our appreciation of the courtesy you have uniformly shown us throughout this hearing and of your patience with us.

Mr. Berman: Mr. Examiner, I think you have been very long suffering and I join in the Judge's statement.

The Examiner: Thank you. As to the American Power & Light Company, the hearing is closed.

[Whereupon at 6 o'clock P. M. the hearing was adjourned.]

* * * * * *

[*18385*] Mr. Berman: Mr. Examiner, may it be stipulated between counsel that neither side has any further evidence to adduce as to respondents, American Power & Light Company and Electric Power & Light Corporation, and that as to such respondents the record may be deemed closed?

Mr. Fromen: Counsel for the respondents, Electric Power & Light Corporation, so stipulates.

Mr. Calkins: Counsel for American so stipulates.

Mr. Berman: At the hearing held on July 22, 1942, counsel for American Power & Light Company stipulated that it waived the right to request Trial Examiner's report and the filing of proposed findings of fact and conclusions of law, other than in the manner specified on such record. Will Electric Power & Light Corporation at this time [*18386*] stipulate that it likewise waives Trial Examiner's report and the filing of proposed findings of fact?

Mr. Fromen: Counsel for Respondent, Electric Power & Light Corporation, so stipulates.

The Examiner: The several stipulations will be noted.

Mr. Berman: At this time, Mr. Examiner, I will ask that there be received, as Commission's Exhibits 1070 and

1071, stipulations entered into between counsel for the Public Utilities Division and counsel for American Power & Light Company and Electric Power & Light Corporation, respectively, with regard to various procedural matters incident to the disposition of the present proceeding by the Commission.

Mr. Calkins: No objection.

Mr. Fromen: No objection.

The Examiner: Without objection, the two stipulations just identified will now come in as Commission's Exhibits 1070 and 1071.

[Commission's Exhibits 1070 and 1071 received in evidence.]

Mr. Berman: Mr. Examiner, at this time I will move that the hearing be adjourned subject to further disposition and call of the Commission.

The Examiner: Any objection?

Mr. Fromen: No objection.

Mr. Calkins: No objection.

[*18387*] The Examiner: The motion is granted and the hearing in this proceeding, in so far as it pertains to American Power & Light and Electric Power & Light, is now closed and the balance of the matters comprehended by the Commission's order is adjourned subject to the order of the Commission

Mr. Berman: Thank you very much, Mr. Examiner.

Mr. Fromen: Thank you, Mr. Examiner.

Mr. Calkins: Thank you.

[Whereupon the hearing in the above-entitled matter was closed subject to call of the Commission.]

[Document No. 12.]

United States of America

Before the Securities and Exchange Commission

In the Matter of

Electric Bond and Share Company
American Power & Light Company
Pacific Power & Light Company
Electric Power & Light Corporation
Utah Power & Light Company
National Power & Light Company
American & Foreign Power Company Inc.
Ebasco Services Incorporated

Respondents

File No. 59-12

MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR DIRECTIONS AS TO FURTHER PROCEDURE.

[Received for Filing June 22, 1940.]

The respondents in the above entitled matter (excluding American & Foreign Power Company Inc., which has been dismissed as a party by order of the Commission dated June 17, 1940) respectfully submit the following motion, Commission counsel herein having announced, in effect, that he rested his case:

First: The above named respondents respectfully move that these proceedings be dismissed on the following grounds:

(a) That no evidence has been offered in support of the allegations or charges or grounds for action specified in the Commission's original notice and order for hearing herein made on May 9, 1940, as further limited and defined by the orders of June 7, 1940 and June 17, 1940;

(b) That the documents identified as exhibits in evidence do not tend to sustain, and are insufficient to sustain, the allegations, charges or grounds for action specified in the said orders of May 9, 1940 and June 7, 1940;

(c) That the evidence offered is insufficient to sustain the allegations, charges or grounds for action specified in said order of May 9, 1940, viz.: That the structure of the holding company system of Electric Bond and Share Company is unduly and unnecessarily complicated, and that voting power is unfairly and inequitably distributed among security holders; or to permit a determination, under the order of June 7, 1940, whether it is necessary to discontinue existence of American Power & Light Company, Electric Power & Light Corporation and National Power & Light Company to insure that the structure of the holding company system of Bond and Share shall not be unduly or unnecessarily complicated, and that voting power shall not be unfairly or inequitably distributed among security holders of such system; and

(d) Neither the notice and order of May 9, 1940, nor the limiting order of June 7, 1940, nor the documents offered in evidence as exhibits during the hearings held before the Trial Examiner on June 18 and 19, 1940, nor the statement of Commission counsel at the conclusion of his identification of said documents, or any of them, apprise these respondents of the factual issues which they are required to meet, nor of the evidentiary facts which are relied upon to support any determination or order which the Commission may conclude to make in application to any of the respondents of the provisions of Section 11(b)(2) of the Public Utility Holding Company Act of 1935. To require the respondents to proceed and present testimony on the record as thus far

made before the Trial Examiner would constitute a denial of due process of law, in violation of the Fifth Amendment to the Constitution of the United States, and would be an abuse of procedural discretion.

SECOND: In the alternative, the respondents move that Commission counsel be directed, prior to the introduction of any evidence by respondents, to withdraw his submission or "rest" of his case, and to specifically identify those parts of the documents offered by him as exhibits which he will accept and upon which he relies as evidence, and that he offer such further evidence, oral or documentary, as may be required to apprise these respondents of the facts which Commission counsel contends, or will contend, establish the ultimate issues herein, viz: whether the structure of the holding company system of Electric Bond and Share Company is unduly and unnecessarily complicated; whether voting power is unfairly or inequitably distributed among security holders of said system; and whether it is necessary to discontinue the existence of American Power & Light Company, Electric Power & Light Corporation and National Power & Light Company, or any of them, in order to insure that the structure of said holding company system shall not be unduly or unnecessarily complicated, and that voting power shall not be unfairly or inequitably distributed among security holders.

This motion is based upon the official report of proceedings herein, as embodied in the transcript thereof made by Smith & Hulse, official reporters, for June 18 and 19, 1940, and upon the record, documents and exhibits in this case.

Respondents file with this motion their brief of argument, as required by the rules of practice of the Commission, and respectfully request an oral argument thereon.

This motion is made with full reservation of constitutional and legal rights, as provided in Rule 4 of the Rules

and Regulations of the Commission under the Public Utility Holding Company Act of 1935, and subject to and reserving to the respondents all constitutional and legal rights as more fully set forth and stated in the answer of the respondents herein filed with the Commission on June 15, 1940.

Dated, New York, N. Y., June 21, 1940.

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A member of said firm
Office and Post Office Address,
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Attorneys for Respondents.

[DOCUMENT No. 14.]

UNITED STATES OF AMERICA
Before the Securities and Exchange Commission

In the Matter of
Electric Bond and Share Company
American Power & Light Company
Pacific Power & Light Company
Electric Power & Light Corporation
Utah Power & Light Company
National Power & Light Company
Ebasco Services Incorporated
Respondents

File No. 59-12.

STATEMENT BY COMMISSION COUNSEL WITH RESPECT TO EXHIBITS INTRODUCED AT THE HEARINGS HELD ON JUNE 18 AND 19, 1940

[Received for Filing July 1, 1940.]

Ultimate Issues

Counsel for the Commission contend that the affirmative of the issue defined in the Commission's order of June 7, 1940 (as modified by the Commission's order of June 17, 1940 dismissing American and Foreign Power Company Inc. as a party) is established by the exhibits designated Commission Exhibits Numbers 11–70, inclusive, in the manner hereinafter set forth[1]:

I

The continued existence of American, Electric, and National unduly and unnecessarily complicates the structure of the holding company system of Bond and Share in that they neither perform nor are equipped to perform necessary or important functions with respect to the companies in said holding company system, but on the contrary they cause unnecessary and unwarranted expenses of substantial amount, all as particularized hereinafter:

a. The functions of generating, transmitting and distributing electric energy for sale and of distributing natural and manufactured gas at retail, and all activities incidental

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[1] The following terms, whenever used in this statement, have the meanings indicated below:

"Act"—The Public Utility Holding Company Act of 1935
"Bond and Share"—Electric Bond and Share Company
"Ebasco"—Ebasco Services Incorporated
"American"—American Power & Light Company
"Electric"—Electric Power & Light Corporation
"National"—National Power & Light Company
"The sub-holding company respondents"—American, Electric, and National.

to such functions, in the holding company systems of the sub-holding company respondents are performed wholly and exclusively by the subsidiary utility companies of the sub-holding company respondents, excepting only the servicing activities which are performed by Ebasco.

To establish the nature and activities of the subsidiary utility companies as above stated, the following exhibits are relied upon:

(1) Exhibits 11, 12, 13, 16(a), 17(a), 18(a), 23(a), 24(a), 25(a), 30(a), 31(a), 32(a).

Exhibits 11, 12, and 13 are the U5B, U5S (1938), and U5S (1939) statements, respectively, of Bond and Share; Exhibits 16(a), 17(a), and 18(a) are the first volumes of the corresponding statements of American; Exhibits 23(a), 24(a), and 25(a) are the first volumes of the corresponding statements of Electric; and Exhibits 30(a), 31(a), an 32(a) are the first volumes of the corresponding statements of National. Item 4 of each such statement contains a list of the holding companies and subsidiaries, showing state of organization and type of business for each such company.

(2) Same exhibit numbers as in (1), omitting Exhibits 11, 12, and 13

Item 5 of the U5B and each of the U5S statements of each sub-holding company respondent states the general character of the business of each company of the system, and any substantial changes which have occurred therein.

(3) Same exhibit numbers as in (2)

Item 6 of the U5B and each of the U5S statements of each sub-holding company respondent contains a description of the properties of each company of the system, and changes which have occurred therein.

(4) Same exhibit numbers as in (2)

Item 7 of the U5B and each of the U5S statements of each sub-holding company respondent sets forth information concerning electric and gas sales, and interstate transactions, of the companies of each sub-holding company system.

(5) Same exhibit numbers as in (2)

Item 12 of the U5B and each of the U5S statements of each sub-holding company respondent contains information as to important leases of the companies of each sub-holding company system.

(6) Same exhibit numbers as in (2)

Item 18 of the U5B and each of the U5S statements of each sub-holding company respondent contains information respecting the service, sales and construction contracts of the companies of each sub-holding company system.

(7) Exhibits 16(a) and (b), 17(a), 18(a), 23(a-c, incl.), 24(a), 25(a), 30(b) and (c), 31(a), 32(a).

Exhibit B of the U5B and each of the U5S statements of each sub-holding company respondent set forth articles of incorporation, by-laws, etc., and changes therein for the companies of each sub-holding company system.

(8) Exhibits 16(g), 17(b), 18(b), 23(i), 24(b), 25(a) 30(g), 31(a), 32(a)

Exhibit E of the U5B and each of the U5S statements of each sub-holding company respondent comprises maps of utility operations.

(9) Exhibits 16(g), 17(b), 18(b), 23(i), 24(b), (d), (e), 25(b), 30(g), 31(a), (b), (d), 32(b)

Exhibit F of the U5B and each of the U5S statements of each sub-holding company respondent contains cop-

ies of annual reports to stockholders of the companies of each sub-holding company system.

(10) Exhibits 16(h-n, incl.), 17(b-h, incl.), 18(b-f, incl.), 23(i-l, incl.), 24(b-e, incl.), 25(b-e, incl.), 30(g-i, incl.), 31(a-d, incl.), 32(b-d, incl.)

Exhibit G of the U5B and each of the U5S statements of each sub-holding company respondent sets forth copies of annual reports to regulatory commissions of the companies of each sub-holding company system.

(11) Exhibits 21, 22, 28, 29(a), (b), 35, 36

These exhibits comprise the Form 10 and 10-K statements of the three sub-holding companies. Item 11 of the Form 10 statements and Item 7 of the Form 10-K statements set forth information respecting the general character of the business of the companies of each system and changes therein.

(12) Same as (11)

Item 12 of the Form 10 statements and Schedule II of the Form 10-K statements set forth a description of the properties of the companies of each system, and changes therein.

(13) Exhibits 68(b), 68(d), 68(e), and 68(f)

Exhibit 68(b) contains Articles XVIII to XXI, inclusive, of the stipulation of facts in the case of Securities and Exchange Commission *v.* Electric Bond and Share Company, et al., and Exhibit 68(d), (e), and (f) are exhibit volumes to said stipulation containing exhibits referred to in Articles XIX, XX, and XXI thereof. Said Articles XIX, XX, XXI and the exhibits referred to therein contain a description of the electric operations of the subsidiaries of the three sub-holding companies, and of the properties and physical operations of the gas companies of the systems.

(14) Exhibits 68(a) and 68(c)

Articles VI, VII, VIII of the aforementioned stipulation of facts and the exhibits referred to therein which are contained in Exhibit 68(c) recount the organization and history of the sub-holding companies with a list and description of their subsidiaries.

(15) Exhibit 38(a) to 38(t), inclusive

These exhibits contain the record of the proceeding before this Commission in connection with the declaration of Ebasco under Section 13 of the Act, and Rule U-13-22 thereunder. This record contains information with respect to the operations of the subsidiary utility companies of the three sub-holding company respondents.

b. The sub-holding company respondents operate merely as securities companies engaged in holding securities of their operating subsidiaries, exercising voting rights incidental thereto, receiving interest and dividends thereon, and servicing their own outstanding securities.

To establish the nature and activities of the sub-holding company respondents as above stated, the following exhibits are relied upon:

(1) Exhibits 16(a), 17(a), 18(a), 23(a), 24(a), 25(a) 30(a), 31(a), 32(a)

These exhibits comprise the U5B, U5S (1938) and U5S (1939) statements of each of the sub-holding company respondents, as described above. Item 5 of each such statement states the general character of the business of each such sub-holding company respondent, and any substantial changes which have occurred therein.

(2) Same exhibit numbers as in (1)

Item 6 of the U5B, U5S (1938) and U5S (1939) statement of each sub-holding company respondent contains

a description of the properties of each such company, and changes which have occurred therein.

(3) Exhibits 19, 26, 33

These exhibits contain the U-14-3 statements of each sub-holding company respondent. They include financial and operating data which throw light upon the nature and extent of the activities of these companies.

(4) Exhibits 63, 64, 65

These exhibits are tabulations prepared by the staff of the Commission showing the expenses for the year 1939 of each sub-holding company respondent, as bearing on the nature and extent of the activities of these companies.

(5) Exhibit 70

This exhibit consists of information supplied by the respondents setting forth an analysis of personnel of each sub-holding company respondent.

(6) Exhibits 46, 47, 48

These exhibits comprise the annual reports of the sub-holding companies to their stockholders, 1929–1938, inclusive. They afford information with respect to the functions and operations of the sub-holding companies during such years.

(7) Exhibits 18(b), 25(b), 32(b)

Exhibit F of the U5S (1939) statement of each sub-holding company respondent contains a copy of the annual report to stockholders of such company for the year 1939, and affords information concerning the operations of such company for that year.

(8) Exhibits 21, 22, 28, 29(a) and (b), 35, 36

These exhibits are the Form 10 and 10-K statements of the sub-holding company respondents. Item 11 of the

Form 10 statements and Item 7 of the 10-K statements contain information concerning the general character of the business of the sub-holding company respondents, and changes which have occurred therein.

(9) Exhibits 21, 28, 35

Item 12 of the Form 10 statements of the three sub-holding company respondents contains information with respect to the properties of each sub-holding company respondent.

(10) Exhibit 69

This exhibit sets forth the answer of the respondents in the case of Securities and Exchange Commission *v.* Electric Bond and Share Company et al. Paragraphs 32 to 35, inclusive, and paragraph 39 thereof contain statements with regard to the nature and activities of the sub-holding company respondents and their relations to their subsidiaries and to the holding company system.

(11) Exhibits 68(b) and 68(d)

Articles VI, VII and IX, and the exhibits referred to therein, of the stipulation of facts in the case of Securities and Exchange Commission *v.* Electric Bond and Share Company et al., contain statements with respect to the organization and history of the sub-holding company respondents and their relations to their subsidiaries and to the holding company system.

(12) Exhibits 68(b), (d), (e)

Articles X, XI, XII, XIII, XIV, and exhibits referred to therein, of the aforementioned stipulation of facts, contain a description of the relations between Electric Bond and Share Company, the sub-holding company respondents and the subsidiary operating companies

thereof, before and after November, 1935. They also set forth the history of the Bond and Share service organization, its relations to the sub-holding company respondents and their subsidiaries, and the subsequent relations with Ebasco.

(13) Exhibits 39(a) to 39(c) incl., 40(a), 40(b), 41(a), 41(b), 42(a), 42(b), 43(a), to 43(d), incl., and 44(a) to 44(c), incl.

These exhibits comprise the records of the proceedings before this Commission in connection with applications and declarations filed principally under sections 6 and 7 of the Act by various subsidiaries of American and National. The records of these proceedings establish that the sub-holding companies play no part in arranging for such financing by their subsidiaries.

(14) Exhibits 38(a) to 38(t), inclusive.

The record of the proceedings in connection with the declaration of Ebasco under Rule U-13-22, described above, throws further light upon the nature and extent of the participation of the sub-holding company respondents in the affairs of their subsidiary companies.

c. All service, sales, and construction contracts performed for subsidiary utility companies of the sub-holding company respondents are performed exclusively by Ebasco, a direct subsidiary of Bond and Share. These contracts embrace every important phase of the operations and activities of the operating companies, not only with respect to their physical operations as utility companies but also with respect to all corporate matters such as accounting, purchasing, budgeting, marketing and financing. The services are performed under contracts between Ebasco and the operating companies without participation by the sub-holding company respondents.

To establish the nature and activities of Ebasco and its relationships to the subsidiary companies of American, Electric, and National the following exhibits are relied upon:

(1) Exhibit 37

This exhibit is the Form U-13-60 statement filed by Ebasco for the year 1939, and sets forth financial and operating data establishing the nature of the organization and the extent of the operations performed by Ebasco for the subsidiary companies of the sub-holding company respondents.

(2) Exhibit 38(a) to 38(t), inclusive

This record of the proceedings in connection with the declaration of Ebasco under Rule U-13-22, described above, establishes the comprehensive nature of the services performed by Ebasco for the subsidiary companies of the sub-holding company respondents, and the nature of the relationships between Ebasco and these subsidiary companies.

(3) Exhibits 68(a), 68(d) and 68(e)

Exhibits 68(a) contains Articles I to XVII, inclusive, of the stipulation of facts in the case of Securities and Exchange Commission *v.* Electric Bond and Share Company, et al., and Exhibits 68(d) and 68(e) are exhibit volumes to said stipulation containing exhibits referred to in Articles XIII, XIV, and XV thereof. Said Articles XIII, XIV and XV and the exhibits referred to therein set forth information concerning the origin and history of the Bond and Share service organization, the nature and extent of the services rendered by Bond and Share to its subsidiary companies prior to November, 1935, the organization of Ebasco and related events, and the nature and extent of the services rend-

ered by Ebasco to the subsidiary companies of Bond and Share subsequent to November, 1935. All this information evidences the all-embracing character of the services rendered originally by the service department of Bond and Share and subsequently by its wholly-owned subsidiary.

(4) Exhibits 39(a) to 39(c), incl., 40(a), 40(b) 41(a), 41(b), 42(a), 42(b), 43(a) to 43(d), incl., 44(a) to 44(c), incl.

These exhibits are the records of the proceedings before this Commission in connection with applications and declarations filed principally under Sections 6 and 7 of the Act by various subsidiaries of National and American. The records of these proceedings establish that financing transactions of the operating subsidiaries are planned, negotiated, and executed by Ebasco and Bond and Share in conjunction with the respective issuing company, and that the sub-holding company respondents play no role in such financing arrangements.

(5) Exhibits 16(a), 17(a), 18(a), 23(a), 24(a), 25(a), 30(a), 31(a), 32(a)

These exhibits comprise portions of the U5B, U5S (1938) and U5S (1939) statements of American, Electric and National, as described above. Item 18 of each such statement sets forth information with respect to the service, sales, and construction contracts of the subsidiary companies of each sub-holding company respondent.

(6) Exhibits 16(n), 17(d), 18(f), 23(l), 24(c), 25(e) and (f), 30(i), 32(d) and (e)

Exhibit H of the U5B, U5S (1938) and U5S (1939) of each sub-holding company respondent sets forth forms

of service, sales, and construction contracts for the subsidiaries of each holding company system.

(7) Exhibits 21, 22, 28, 29(a), (b), 35, and 36

These exhibits comprise the Form 10 and 10-K statements of sub-holding company respondents, as described above. Item 30 of the Form 10 statements and Item 5 of the Form 10-K statements set forth management and service contracts, and changes therein.

(8) Same as (7)

Exhibit F of the Form 10 and 10-K statements of each sub-holding company respondent sets forth copies of management and service contracts, and amendments thereto.

d. The nature and extent of the services which Bond and Share and Ebasco render to the subsidiary companies of the sub-holding company respondents are such as to leave no important services to be performed by the sub-holding company respondents for their subsidiary companies. The sub-holding company respondents do not, in fact, render important services to their subsidiary companies, nor are the sub-holding company respondents equipped to perform any such services.

To establish the foregoing, the following exhibits are relied upon:

(1) All the exhibits cited above under points I-a, b, and c, and in addition:

(2) Exhibit 70

Exhibit 70 contains an analysis of the personnel of each of the sub-holding company respondents which tends to establish, and which when considered in conjunction with the personnel data for Ebasco contained in Exhibits 37 and 38t (referred to above) conclusively estab-

lishes, that these companies are in no manner equipped to furnish services to their subsidiary companies.

e. The continued existence of the sub-holding companies further unduly and unnecessarily complicates the structure of the holding company system because it entails unnecessary and unwarranted expenses of substantial amount.

To establish the foregoing, the following exhibits are relied upon:

(1) Exhibits 63, 64, 65

These exhibits are compilations prepared by the staff of the Commission, analyzing and summarizing the annual expenses of American, Electric and National.

(2) Exhibits 19, 26, 33

These exhibits comprise the U-14-3 statements of American, Electric, and National which set forth detailed information with respect to the operations of the sub-holding company respondents and the expenses in connection therewith.

II

The continued existence of American, Electric, and National causes voting power to be unfairly and inequitably distributed among the security holders of the holding company system of Electric Bond and Share Company in that these companies constitute a pyramiding device whereby the holding company systems of these companies are effectively controlled by Bond and Share through disproportionately small investments, with resulting disfranchisement of public security holders, all as particularized hereinafter:

a. Bond and Share owns securities of the three sub-holding company respondents which have a combined book value in the capitalization accounts of these companies of $104,161,998.45, as compared with a corresponding combined

book value of $487,580,411.48 applicable to securities of these companies held by the public. The foregoing securities owned by Bond and Share are carried as investments on its books at the value of $119,958,455.88, which is $6,230,341 in excess of the cost of the securities to Bond and Share or such other company in the same holding company system as may first have acquired the same. Through the ownership of the foregoing securities of the three sub-holding company respondents and by reason of the distribution of voting power among security holders of said companies, Bond and Share is in a position to control, and does control, said companies.

To establish the foregoing, the following exhibits are relied on:

(1) Exhibit 13

This exhibit is the U5S (1939) statement of Bond and Share. Item 8 thereof sets forth data as to the securities outstanding of the sub-holding company respondents, and as to which of such securities have voting power.

(2) Exhibit 13

Item 9 of the U5S (1939) statement of Bond and Share sets forth the investments of Bond and Share in its subsidiary companies, the "value per books of issuer", the carrying value to Bond and Share, and the "cost to system company originally acquiring security".

(3) Exhibit 13

Exhibit A of the U5S (1939) statement of Bond and Share is a corporate chart showing the relationship of Bond and Share, Ebasco, and the sub-holding company respondents.

(4) Exhibits 18(b), 25(a), 32(a)

These exhibits are portions of the U5S (1939) state-

ments of American, Electric, and National, respectively. Exhibit D of each such statement sets forth consolidating financial statements for the respective holding company systems of the sub-holding company respondents as of December 31, 1939.

(5) Exhibits 16(a), 16(b), 17(a), 18(a), 23(a), to (c), incl., 24(a), 25(a), 30(b), 30(c), 31(a), 32(a)

These exhibits are portions of the U5B and U5S statements of American, Electric, and National, respectively. Exhibit B of each such statement contains copies of articles of incorporation and by-laws, and amendments thereto, which set forth the voting rights and other rights pertaining to each class of stock of the sub-holding company respondents and the companies in their respective holding company systems.

(6) Exhibit 13, 18(b), 25(b), 32(b)

These exhibits are portions of the U5S (1939) statements of Bond and Share, American, Electric, and National, respectively. Exhibit F of each such statement contains copies of annual reports to stockholders of these companies and their subsidiaries. The annual reports of the sub-holding company respondents contain financial statements as of December 31, 1939, both on a corporate basis and a consolidated basis, and set forth the capitalizations of the sub-holding company respondents and the outstanding securities of their respective subsidiaries.

(7) Exhibits 14, 19, 26, 33

These exhibits are the U-14-3 statements of Bond and Share, American, Electric, and National, previously referred to. They set forth corporate financial statements and detailed supporting schedules.

(8) Exhibits 22, 29(b), 36

Item 8 of the Form 10-K statements for 1939 of American, Electric, and National, respectively, sets forth financial statements of these companies as of December 31, 1939 on both a corporate basis and a consolidated basis.

(9) Exhibit 55

This exhibit is a tabulation prepared by the staff of the Commission summarizing the investments of Bond and Share in the securities of the three sub-holding company respondents.

(10) Exhibit 56

This exhibit is a tabulation prepared by the staff of the Commission setting forth the excess of carrying value over cost to the system company originally acquiring the sub-holding company securities now held by Bond and Share.

(11) Exhibits 52, 53, 54

These exhibits are tabulations prepared by the staff of the Commission showing the capitalization and surplus of each sub-holding company respondent, the total votes and percentage of voting power applicable to each class of stock, and the percentage of voting power in each such company applicable to stock held by Bond and Share.

(12) Exhibits 20, 27, 34

These exhibits contain proxy statements filed with the Commission by American, Electric, and National, respectively, which illustrate the practices of these companies with respect to annual meetings of their stockholders and proxy solicitations in connection therewith.

(13) Exhibit 49

This exhibit contains data with respect to the number of shares of stock voted by Bond and Share at the stockholders' meetings of the sub-holding company respondents, the percentage of such shares in relation to total shares voted, and the representation of Bond and Share at such meetings by management proxies.

(14) Exhibits 68(a), (c), (d)

Exhibit 68(a) contains Articles I to XVII, inclusive, of the stipulation of facts in the case of Securities and Exchange Commission *v.* Electric Bond and Share Company et al., previously referred to. Articles V to XV inclusive of said stipulation, and the exhibits referred to therein, contain information with respect to the corporate structures and inter-relationships of the companies of the system, the history and development of the sub-holding company respondents and their subsidiaries, and their relations to Bond and Share both before and after November, 1935. Exhibits 68(c) and 68(d) contain the exhibits referred to in Articles V to XV of Exhibit 68(a).

(15) Exhibit 69

Paragraphs 27 to 47, inclusive, of the answer of the respondents in the case of Securities and Exchange Commission *v.* Electric Bond and Share Company, et al., contain statements with respect to the relations of the sub-holding company respondents and their subsidiaries to Bond and Share.

(16) Exhibits 18(a), 25(a), 32(a)

Item 15 of the U5S (1939) statements of American Electric, and National contains a classification of stockholders according to the size of their holdings and sets forth the number of stockholders within each size classi-

fication and the aggregate number of shares held by them.

b. The three sub-holding company respondents own securities of their subsidiaries which have a combined book value in the capitalization accounts of these subsidiary companies of $537,959,791.94 as compared with a corresponding combined book value of $1,058,740,588 applicable to securities of these companies held by the public and $38,325,666 applicable to securities held by Bond and Share. The foregoing securities owned by the three sub-holding company respondents are carried as investments on their respective books at the combined value of $563,451,202.72. Through the ownership of the foregoing securities of their subsidiary companies and by reason of the distribution of voting power among security holders of such companies, the three sub-holding company respondents constitute a medium whereby Bond and Share is in a position to control, and does control, the holding company systems of the three sub-holding company respondents:

To establish the foregoing, the following exhibits are relied upon:

(1) All the exhibits cited above under point II-a, and in addition:

(2) Exhibits 18(a), 25(a), 32(a)

Item 8 of the U5S (1939) statements of American, Electric, and National sets forth data with respect to the securities outstanding of the sub-holding company respondents and each of their subsidiary companies, and as to which of such securities have voting power.

(3) Exhibits 18(a), 25(a), 32(a)

Item 9 of the U5S (1939) statements of American, Electric, and National sets forth the investments of these companies in securities of their respective subsidiary

companies, the "value per books of issuer", the "carrying value to issuer" and the "cost to system company originally acquiring security".

(4) Exhibits 18(a), 25(a), 32(a)

Exhibit A of the U5S (1939) statements of American, Electric, and National is a corporate chart showing the relationship of the respective sub-holding company respondent to its subsidiary companies.

(5) Exhibits 57, 58, 59, 60

These exhibits are tabulations prepared by the staff of the Commission summarizing the investments of Bond and Share and of the sub-holding company respondents in the securities of subsidiaries of the sub-holding company respondents.

(6) Exhibit 61

This exhibit is a tabulation prepared by the staff of the Commission setting forth the combined consolidated capitalization of American, Electric, and National.

(7) Exhibits 39(a) to 39(c), incl., 40(a), 40(b), 41(a), 41(b), 42(a), 42(b), 43(a) to 43(d), incl. and 44(a) to 44(c), incl.

These exhibits comprise the records of certain financing proceedings before this Commission previously referred to, and throw light upon the relations of Bond and Share with the subsidiary companies of the sub-holding company respondents.

(8) Exhibits 38(a) to 38(t), inclusive

The record of the proceedings in connection with the declaration of Ebasco under Rule U-13-22, previously referred to, throws further light upon the relations of Bond and Share with the subsidiary companies of the sub-holding company respondents.

c. The total investments of Bond and Share in securities of the subsidiaries of the three sub-holding company respondents, substantially all of which investments are in non-voting securities, are carried on its books at the value of $78,058,393.90. This amount includes $28,925,000 which is not included in the capitalization accounts of the issuing company but is carried in current liabilities of that company. The book value in the capitalization accounts of the respective issuing companies of the remaining $49,133,393.90 of investments is $38,325,666.

To establish the foregoing, the following exhibits are relied upon:

(1) Exhibit 57

This exhibit is a tabulation prepared by the staff of the Commission summarizing the investments of Bond and Share in the securities of the subsidiary companies of the sub-holding company respondents.

(2) Exhibit 13

Item 9 of the U5S (1939) statement of Bond and Share sets forth the investments of Bond and Share in the subsidiary companies of the sub-holding company respondents, the "value per books of issuer", the carrying value to Bond and Share, and the "cost to system company originally acquiring security".

(3) Exhibits 13, 18(a), 25(a), 32(a)

Item 8 of the U5S (1939) statements of Bond and Share, American, Electric, and National sets forth data as to the securities outstanding of each such company and its subsidiary companies.

(4) Exhibits 13, 18(b), 25(a), 32(a)

Exhibit D of the U5S (1939) statements of the sub-holding company respondents sets forth consolidating

financial statements for the respective holding company systems of these companies, and Exhibit D of the U5S (1939) statement of Bond and Share sets forth financial statements of Bond and Share, as of December 31, 1939.

(5) Exhibit 14

This exhibit is the U-14-3 statement of Bond and Share, previously referred to. It sets forth corporate financial statements and detailed supporting schedules.

d. The combined consolidated capitalization of the three sub-holding company respondents and their respective subsidiaries equals $1,688,808,664, of which $142,487,664, or 8.4%, is applicable to securities owned by Bond and Share as described in paragraphs (a) and (c) hereof, and $1,546,321,000, or 91.6%, is applicable to securities owned by the public. Of the $142,487,664 referred to above, $103,524,164, or 72.7%, is applicable to voting securities and the balance is applicable to non-voting securities, such voting securities constituting 6.1% of the combined consolidated capitalization of $1,688,808,664. The combined consolidated assets of the three sub-holding company respondents and their respective subsidiaries which are controlled by Bond and Share through ownership of 6.1% of their combined consolidated capitalization are carried on their books at $2,097,855,258.47.

To establish the foregoing, the following exhibits are relied upon:

(1) Exhibit 61

This exhibit is a tabulation prepared by the staff of the Commission setting forth the combined consolidated capitalization of American, Electric, and National.

(2) Exhibits 55 and 57

These exhibits are tabulations prepared by the staff of

the Commission summarizing investments of Bond and Share in securities of the sub-holding company respondents and their subsidiaries.

(3) Exhibit 13

Item 9 of the U5S (1939) statement of Bond and Share sets forth the investment of Bond and Share in system securities, including the "value per books of issuer" and the carrying value to Bond and Share.

(4) Exhibit 14

The U-14-3 statement of Bond and Share sets forth corporate financial statements and detailed supporting schedules.

(5) Exhibits 18(a), 25(a), 32(a)

Item 8 of the U5S (1939) statements of American, Electric, and National sets forth data with respect to the securities outstanding of the sub-holding company respondents and each of their subsidiary companies, and as to voting power thereof.

(6) Exhibits 13, 18(b), 25(a), 32(a)

Exhibit D of the U5S (1939) statements of the sub-holding company respondents sets forth consolidating financial statements for the respective holding company systems of these companies, and Exhibit D of the U5S (1939) statement of Bond and Share sets forth financial statements of Bond and Share, as of December 31, 1939.

(7) Exhibits 13, 18(b), 25(b), 32(b)

Exhibit F of the U5B (1939) statements of Bond and Share, American, Electric, and National contains copies of annual reports to stockholders of these companies and their subsidiaries for the year ended December 31, 1939.

(8) Exhibits 22, 29(b), 36

Item 8 of the Form 10-K statements for 1939 of American, Electric, and National, respectively, sets forth financial statements of these companies as of December 31, 1939, on both a corporate and a consolidated basis.

e. Market values of all classes of outstanding securities of the three sub-holding company respondents of which any portion is owned by Bond and Share were substantially less, throughout the calendar year 1939, than the book values on the books of either the respective issuing company or Bond and Share as described above.

To establish the foregoing, the following exhibits are relied on:

(1) Exhibit 50

This exhibit is a table showing market values during 1939 of the securities of Bond and Share, American Electric, and National.

(2) Exhibit 55

This exhibit sets forth the investments of Bond and Share in securities of the sub-holding company respondents, the value in the capitalization accounts of the respective issuing companies, and the carrying value to Bond and Share.

(3) Exhibit 13

Item 9 of the U5S (1939) statement of Bond and Share shows the investments of Bond and Share in system securities, including the "value per books of issuer" and the carrying value to Bond and Share.

(4) Exhibits 13, 18(a), 25(a), 32(a)

Item 8 of the U5S (1939) statements of Bond and Share, American, Electric, and National sets forth

data as to the securities outstanding of each such company and its subsidiary companies.

(5) Exhibits 13, 18(b), 25(a), 32(a)

Exhibit D of the U5S (1939) statements of the sub-holding company respondents sets forth consolidating financial statements for the respective holding company systems of these companies, and Exhibit D of the U5S (1939) statement of Bond and Share sets forth financial statements of Bond and Share, as of December 31, 1939.

(6) Exhibits 13, 18(b), 25(b), 32(b)

Exhibit F of the U5S (1939) statements of Bond and Share and the sub-holding company respondents contains copies of annual reports to the stockholders of these companies.

(7) Exhibits 14, 19, 26, 33

The U-14-3 statements of Bond and Share and the sub-holding company respondents set forth corporate financial statements and detailed supporting schedules.

(8) Exhibits 22, 29(b), 36

Item 8 of Form 10-K statements for 1939 of American, Electric, and National, respectively, sets forth financial statements of these companies as of December 31, 1939, on both a corporate basis and a consolidated basis.

f. At December 31, 1939, accumulated dividends in arrears on preferred stocks held by the public (excluding Bond and Share) totalled $30,649,066.88 in the case of American and $40,245,655.83 in the case of Electric. In addition, accumulated dividends in arrears on preferred stock of subsidiary companies of American held by the public totalled $8,052,832.11, accumulated dividends in arrears on preferred stocks of subsidiary companies of Elec-

tric held by the public (excluding Bond and Share) totalled $21,151,639.66, and accumulated dividends in arrears on subsidiary companies of National held by the public totalled $341,020.67.

To establish the foregoing, the following exhibits are relied upon:

(1) All the exhibits cited under point II-e, except Exhibit 50, and in addition:

(2) Exhibit 67

This exhibit is a tabulation prepared by the staff of the Commission setting forth accumulated dividend arrearages on preferred stocks of American and Electric as of December 31, 1939, indicating amounts applicable to stocks held by Bond and Share and by the public.

Note—In the foregoing statement, counsel have attempted to refer to each exhibit in connection with each separate topic to which it is relevant and material. However, they expressly reserve the right to cite any such exhibit in connection with any other topic or topics to which it may be relevant and material, or to correct any errors or omissions, but only after notice to respondents and only in such manner that respondents will have opportunity for hearing (including opportunity to present relevant and material evidence) with respect thereto.

All dollar figures in the foregoing statement, except where otherwise specifically designated, are as of December 31, 1939.

GENERAL

The exhibits which have been designated Commission's Exhibits 1 to 70, inclusive, and all parts thereof, whether or not previously referred to in this statement in connection with any specific point bearing upon the "ultimate" issues,

have been placed in evidence and are relied upon by counsel to the Commission to establish—

A. The corporate structure of Bond and Share, American, Electric, and National and the subsidiary companies thereof, the relationships among the companies in the holding company systems of Bond and Share, American, Electric, and National, and the character of the interests thereof and the properties controlled thereby, and

B. The power of Congress to enact, and of the Commission to apply, the provisions of Section 11(b)(2) with respect to the respondents in this proceeding,

with reference both to the issue stated in the Commission's order of June 7, 1940, and to the issues stated in the notice of and order for hearing dated May 9, 1940.

Exhibits 1 to 70, inclusive, are not presently relied upon, however, to establish the affirmative of the issue defined in the Commission's order of June 7, 1940, except to the specific extent, and in the specific manner, stated in the preceding portions of this statement under the caption "Ultimate Issues". Nevertheless, counsel expressly reserve the right to cite any such exhibit or portion thereof, even though not specifically designated in the preceding portions of this statement under the caption "Ultimate Issues", in connection with the issue defined in the Commission's order of June 7, 1940, or any other issue to which it may later appear relevant and material, but only after notice to respondents and only in such manner that respondents will have opportunity for hearing (including opportunity to present relevant and material evidence) with respect thereto.

MILTON H. COHEN,
ALFRED BERMAN,
Counsel to the Commission.

June 29, 1940.

[Document No. 15.]

United States of America

Before the Securities and Exchange Commission

In the Matter of

Electric Bond and Share Company,
American Power & Light Company,
Pacific Power & Light Company,
Electric Power & Light Corporation,
Utah Power & Light Company,
National Power & Light Company,
Ebasco Services Incorporated,
Respondents.

File No. 59-12.

Reply Statement by Respondent to "Statement by Commission Counsel with Respect to Exhibits Introduced at the Hearings Held on June 18 and 19, 1940."

RESPONDENTS' REPLY STATEMENT.

[Received for Filing July 10, 1940.]

Counsel for respondents received on July 2, 1940, the statement of Commission counsel dated June 29, 1940, and bearing filing mark of the Commission of July 1, 1940, entitled "Statement by Commission Counsel with Respect to Exhibits Introduced at the Hearings Held on June 18 and 19, 1940." We assume that this statement may be taken at the moment as a supplement to the brief filed by Commission counsel in opposition to respondents' motion to dismiss or for alternative relief filed by counsel for respondents on June 22, 1940. It may be intended to serve the further purpose, if so ordered by the Commission, of further definition and identification of the exhibits offered in evidence on behalf of the Commission on June 18th and 19th. However, it does not satisfy the objectives of respondents' motion. It

is, in fact, merely an amplification of the statement of Commission counsel made at pages 173 to 180 of the transcript of record, defining the issues and the conclusions which they draw from the exhibits. It leaves the respondents in the same position as though this statement were not furnished.

Counsel again states, in substance, that he relies on voluminous exhibits to support certain factual conclusions upon which findings determinative of the issues may be made by the Commission.

The present "Statement of Commission Counsel" in effect merely states what these documents or specified portions thereof are offered to prove. In some instances, specific "Items" of certain documents are referred to, but the offer of proof is not limited to these items, and express reservation is made of the right to refer to any other portion of the documents.

We are not able to identify with precision from respondents' records in the New York offices everything that is included in the Commission's exhibits, as the exhibit numbered volumes have been compiled from documents filed with the Commission at various times by respondents and their subsidiaries, such filings having been made separately and not assembled in respondents' offices in corresponding volumes. However, from the best approximate count that we can make, even the exhibits and parts of exhibits now specified by Commission counsel are compiled from 529 separate reports, pamphlets or other documents filed by respondents and their subsidiaries with the Commission, and giving full effect to the limitations to certain "items", comprise a computed total of 43,417 pages.

It is the respondents' contention that they are entitled at this hearing before the Commission to have the specific portions of these voluminous documents that are relied upon identified by offers of proof limited to those specific portions and with sufficient description in the transcript of

record to state what is proven, and connect the proven facts in orderly relation to the issues. If, as is claimed with respect to a number of paragraphs in counsel's statement, that some specific proof is contained in certain "Items" of the documents, as, for example, the description of the business of respondents' subsidiaries, there would seem to be no good reason why this essential matter should not be incorporated in the transcript so that any one reading it would know what was involved and so that respondents when they make their case would neither indulge in useless repetition nor fail to offer any needed supplementary proof.

But in many of the cases there is no limitation of the documents identified to either specific points or specific pages or items of the documents. For illustration, under Paragraph I (a) (15), the Ebasco record in the proceedings under Section 13 of the Act is referred to as containing "information with respect to the operations of the subsidiary utility companies of the three sub-holding company respondents". This record is embraced in 17 volumes of transcript and 112 accompanying exhibits, with an aggregate of 8,811 pages, including both transcript and exhibits. Obviously this description is no limitation at all.

Paragraph I (b) (6) refers to annual reports of holding companies from 1929 to 1938, inclusive, as affording "information with respect to the functions and operations of the sub-holding companies during such years". These comprise 30 volumes with an aggregate of 674 pages. Paragraph I (b) (13) refers to two Form U-1 Statements and four Form U-6B-7 Statements filed by various subsidiary companies in connection with financing. These are said to "establish that the sub-holding companies play no part in arranging for such financing by their subsidiaries". These statements aggregate 7,700 pages.

Paragraphs I (a) (9) identifies "copies of annual reports to stockholders of the companies of each sub-holding company system" without any reference at all to what is proven

thereby, and thus includes 131 annual reports aggregating 1,449 printed pages.

Item I (a) (10) identifies "copies of annual reports to regulatory commissions of the companies of each sub-holding company system" and incorporates in the record 194 such reports, aggregating 17,623 pages.

We might continue with similar description of most of the paragraphs of Commission counsel's statement. Several paragraphs of the statement merely state that voluminous documents "throw light upon the nature and extent of the activities of these companies", or "afford information concerning the operations" of some company, or give "information concerning the general character of the business", or include "statements with respect to the organization history," etc.

In brief, the statement of Commission counsel does not answer the respondents' motion or afford any basis upon which respondents may intelligently proceed in the development of their case.

A further consideration requires comment. An order made by the Commission under Section 11(b)(2) of the Act is expressly made the subject of appeal to the courts and further is not self-executing but may be enforced only by judicial proceedings under Section 11(d) in which the court sits as "a court of equity". In such a proceeding, it would appear that the court has general equity jurisdiction not only over the administration but also over the substance of the plan proposed by the Commission. In either form of proceeding, and certainly on direct appeal, the record upon which the Commission's order is based must be made in such form as will make possible and facilitate judicial review. Certainly the record here proposed to be made by Commission counsel affords no basis at all for such review. Its volume is prohibitive. The procedure adopted by Commission counsel is inconsistent with the fundamentals of due process. *U. S.* v. *Abilene & Southern Railway Co.*, 265

U. S. 274; *Morgan* v. *United States*, 304 U. S. 1; *Crowell* v. *Benson*, 285 U. S 22; cf. also, *Ohio Bell Telephone Company* v. *Commission*, 301 U. S. 292.

We are seeking not to complicate but to simplify the proceeding. It is obvious that what we ask Commission counsel to do must be done at some time before the hearings are concluded and should, in the interest of reaching a speedy conclusion in an orderly manner, be done before respondents start putting in their testimony. If not done by counsel for the Commission, respondents must, in order to adequately protect their interests, have time to go through the great mass of exhibits introduced by Commission counsel, to make sure that all important portions of them are met by evidence by respondents. To do this would obviously require a great deal of time, and the hearings could not properly be resumed for many weeks—or even for many months. Certainly due process would require that respondents be given time to examine the evidence to be used against them before being required to put in their own evidence. The fact that respondents are familiar with the material of the exhibits does not limit the necessity of such examination. The relation of the particular portions of the exhibits relied on by Commission's counsel to the issues here raised must be scrutinized and weighed.

It is probable that certain of the material which is included in these exhibits may be required by both parties in the making of an adequate record for Commission action and possible eventual Court review. It is probable that other exhibits are offered merely to establish some factual conclusion which will not be disputed. It is suggested that both time and expense might be saved if counsel for respondents and the Commission would agree, so far as possible, on the facts established by these exhibits, embodying in the agreement such portions of the exhibits as might be required by either party, and embrace their agreement in a stipulation which would dispense with the great bulk of

this exhibit material. Counsel for respondents would be willing to cooperate with Commission counsel to that end.

Respondents rely upon their motion and renew their request for oral argument thereon.

Dated, July 9, 1940.

Respectfully submitted,

SIMPSON THACHER & BARTLETT,
By JOHN F. MACLANE,
A member of said firm,
Office and Post Office Address,
120 Broadway, New York, N. Y.

REID & PRIEST,
By FRANK A. REID,
A member of said firm,
Office and Post Office Address,
2 Rector Street, New York, N. Y.
Attorneys for Respondents.

[DOCUMENT No. 19.]

SECURITIES AND EXCHANGE COMMISSION WASHINGTON

Reg. No. 977119 through 977123 Docket Unit

In the Matter of

Electric Bond and Share Company
American Power & Light Company
Pacific Power & Light Company
Electric Power & Light Corporation
Utah Power & Light Company
National Power & Light Company
Ebasco Services Incorporated
Respondents

File No. 59-12

Public Utility Holding Company Act of 1935
Section 11 (b) (2)

OPINION OF THE COMMISSION

June 30, 1940.

Appearances:

Milton H. Cohen, Esq., and Alfred Berman, Esq., for the Public Utilities Division of the Commission.

Simpson Thacher & Bartlett by John F. MacLane, Esq., and Reid & Priest by Frank A. Reid, Esq., for the respondents.

This proceeding was commenced by the Commission under Section 11 (b) (2) of the Public Utility Holding Company Act of 1935. The order for hearing states that the Commission has reasonable grounds to believe that:

"46. The structure of the holding company system of said Electric Bond and Share Company is unduly and unnecessarily complicated:

"47. Voting power is unfairly and inequitably distributed among security holders of the holding company system of said Electric Bond and Share Company.

"48. Said Electric Bond and Share Company is a holding company with respect to certain subsidiary companies which themselves have subsidiary companies which are holding companies."

At the current stage of the proceeding the issues are limited by the Commission's orders of June 7 and June 17 to a determination of whether it is necessary to discontinue the existence of American Power & Light Company, Electric Power & Light Corporation, and National Power & Light Company "in order to insure that the structure of the holding company system of Electric Bond and Share Company shall not be unduly or unnecessarily complicated, and that voting power shall not be unfairly or inequitably distributed among security holders of such system".

The hearing was commenced before a trial examiner on June 17 and continued on June 18 and 19. At the hearing, counsel for the Public Utilities Division offered and there was received in evidence, subject to certain reservations and limitations, a series of 70 exhibits. These exhibits consist of some 130 volumes, and include various registration statements, declarations with respect to security issues, annual reports and proxy statements filed with the Commission during the last three years by the respondents and certain of their subsidiaries. Included also is the record of the proceeding before the Commission in which Ebasco Services Incorporated, one of the respondents herein, is seeking approval as a subsidiary service company under Section 13 of the Act. There is also included the stipulation of facts and the pleading in the case of *Securities and Exchange Commission* v. *Electric Bond and Share Company et al.*, 303 U. S. 419 (1938).

In making his offer, counsel for the Public Utilities Division made a statement as to the contents of the exhibits offered, the issues in the proceeding, and his contentions, and stated in general terms the manner in which and the extent to which he believed the exhibits served to establish these contentions. After all of the proffered exhibits were received, counsel stated that he believed that he had gone forward with the proof as far as was required and urged that the evidence introduced *prima facie* established the affirmative of the issues framed in the Commission's orders of June 7 and June 17.

Counsel for the respondents thereupon made a statement which has been embodied in the motions now before us. While one of these motions is, in form, a motion to dismiss, it is clear from the briefs and argument that the substantial relief requested is—

"that Commission counsel be directed, prior to the in-

troduction of any evidence by Respondents, to withdraw his submission or 'rest' of his case, and to specifically identify those parts of the documents offered by him as exhibits which he will accept and upon which he relies as evidence, and that he offer such further evidence, oral or documentary, as may be required to apprise these Respondents of the facts which the Commission counsel contends, or will contend, establish the ultimate issues herein. . . ."

In their main brief, respondents contended that the offers of evidence—

"are so restricted and limited that, except as supplemented by further identification and if necessary by oral testimony, they do not constitute evidence sufficient either to support the contentions made or to require or even permit answering testimony by Respondents, that the record is so vague and uncertain that Respondents are not given the notice required by the dictates of due process or orderly quasi judicial procedure, and that, in consequence, the proceeding should be dismissed unless Commission counsel will supply what Respondents conceive to be the present deficiencies in the record."

After the filing of this brief, counsel for the Public Utilities Division served and filed a 27-page document entitled "Statement by Commission Counsel With Respect to Exhibits Introduced at the Hearings Held on June 18 and 19, 1940". This statement sets forth in detail the contentions of counsel and refers to the various exhibits or portions of such exhibits which it is alleged support each of the contentions made to prove the major issues. Counsel for the respondents filed a reply to this statement and we heard argument on July 12.

At the outset it should be noted that no objection to the competency or relevancy of any particular exhibit is now before us. The only question to be determined is whether the offer of proof is sufficiently explicit adequately to apprise respondents of the contentions made by counsel for the Public Utilities Division and the evidence relied upon in support of the facts considered to be established.

We think there is considerable force in respondents' argument as applied to the procedure followed at the hearing. Without deciding whether as a matter of law in the absence of an objection on the ground of relevancy, such exhibits would have to be excluded as improperly offered, this Commission, in the exercise of its powers to insure orderly proceeding in cases before it, believes such a volume of material should not be accepted unless some reasonable indication is given of the relationship between the evidence offered and the facts sought to be proved thereby. Mass offers and mass conclusions without some such specification are conducive neither to efficient administration nor orderly proceedings in that they invite dispute, put a premium on suprise, and open the doors to speculation and conjecture. That mode of procedure, moreover, casts upon the opponent the burden of distributing the probative force of the evidence among the facts contended to be established, a task more properly borne by the proponent who is assumed to know by what evidence he claims to prove each fact he asserts to be in issue.

But whatever may have been the situation when this motion was noticed, the supplemental written statement filed by counsel for the Public Utilities Division, insofar as it relates each fact claimed to have been established to the specific exhibits or portions of exhibits relied upon, is, in our opinion, entirely adequate to apprise respondents both of the contentions of counsel for the Public Utilities Divi-

sion and the evidence offered in support of each contention.[1] With respect to the evidence specifically identified under the two principal issues, the Statement expressly limits counsel for the Public Utilities Division in that they are bound to

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[1] This Statement is drafted on the basis of the ultimate issues framed in the orders of June 7 and June 17. Under the first issue —whether the continued existence of the sub-holding companies, American Power & Light, Electric Power & Light, and National Power & Light, unduly and unnecessarily complicate the structure of the Bond and Share system—counsel assert that these companies neither perform nor are equipped to perform any necessary functions but cause unnecessary and unwarranted expense. To prove this point, counsel contend that all operations are carried on exclusively by the subsidiary companies, and indicate, by exhibit number and in most cases by reference to specific items in such exhibits, the evidence upon which they rely to establish the nature and activities of the subsidiary companies. Similar specification is made with respect to the evidence which it is alleged supports the contention that the three sub-holding companies do no more than exercise voting rights, receive interest and dividends, and service their securities, and establishes the nature and activities of these companies. Again to prove the ultimate issue, counsel contend that all service, sales, and construction contracts for the subsidiary companies are performed exclusively by Ebasco and that the nature of the services of Ebasco and Bond and Share are such as to leave no important services to be performed by the three sub-holding companies, and specify the particular exhibits or portions of exhibits relied upon to establish the nature and activities of Ebasco and of the three sub-holding companies. Finally, there are listed the exhibits which it is contended demonstrate that the existence of the sub-holding companies entails unnecessary and unwarranted expense.

Similar specifications are made under various subdivisions of the second ultimate issue—whether the continued existence of the sub-holding companies causes voting power to be unfairly and inequitably distributed among the security holders of the Bond and Share system.

Respondents point out that certain of the specifications in the Statement are to exhibits which, in some cases, consist of several volumes. The principal example is Exhibit 38, the record in the Ebasco proceeding. The Statement indicates that this record is offered to show the functions performed by and the services rendered to subsidiary companies by Ebasco. The Ebasco proceeding involved that precise issue and, presumably, the 22 volumes of that record represent the evidence which Ebasco's counsel believed was most relevant to that question. Accordingly, we see nothing improper in offering the entire record to support the identical facts

use the documents offered and portions thereof only in accordance with such specifications. However, the Statement includes references to certain exhibits which, we think, have not been sufficiently related to the facts sought to be proved thereby. Reference is made under the two principal issues to Exhibits 39, 40, 41, 42, 43, and 44, each of which constitutes the entire record in a proceeding before the Commission in connection with an application or declaration by certain of respondents' operating subsidiaries under Sections 6 and 7 of the Act. These exhibits, consisting of some 16 volumes were introduced for the purpose of showing (1) that the sub-holding companies play no part in the financing of their operating subsidiaries, and (2) that the financing transactions of the operating subsidiaries are planned, negotiated, and executed by Ebasco and Bond and Share. These records would, of necessity, include much material unrelated to the issues in this case, and no attempt has been made to identify the portions of these exhibits upon which counsel for the Public Utilities Division wish to rely. The Statement also includes a general reservation that, after notice to respondents, all documents specified may be used for other purposes and that all 70 exhibits may be used to prove the corporate structure of the Bond and Share system, and to support the power of Congress to enact Section 11 (b) (2).

We think that the references to the Sections 6 and 7 applications and declarations are not sufficiently specified and

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which Ebasco set out to prove in building up this record. It is to be hoped that counsel for the company and for the Public Utilities Division will find some way to condense the substance of these volumes before the matter reaches final argument.

It is clear from the Statement and the briefs and oral argument of counsel for the Public Utilities Division that they have repudiated the reservation originally stated at the hearing of the right to object to the relevancy and materiality of the documents offered by them. We need not, therefore, discuss the reservation.

that the general reservation is improper and imposes a burden upon the respondents which should be obviated. Accordingly, with respect to these two matters, we shall grant the relief requested and, unless further specification is made, we shall consider, and we direct the trial examiner to treat, as evidence in the record only the documents as to which we have found that sufficiently specific reference is made under the two principal headings of the Statement.[1] Either counsel may, of course, offer any of the excluded material at any time during the hearing upon a proper showing of its relation to the issues in the case.

Finally, if respondents feel that they have been surprised by the use of the exhibits in some way contrary to their understanding of the reservations, they may, of course, at any time, apply to reopen the record, or for such other relief as may be appropriate.

We are entirely sympathetic to respondents' suggestion of the further difficulties occasioned by the introduction of so large a mass of documents which will make for a voluminous record in our ultimate consideration of this matter and in possible court review. Some progress will have been made toward narrowing the record in our disposition of this motion; we are hopeful that additional progress will be made without our further intervention. In any event, at the conclusion of the hearing, in our final consideration of the case, we shall entertain such motions to strike irrelevant and cumulative evidence from the record as counsel may see fit to present. Moreover, if we then find that the record is so unwieldy as to be an unintelligible guide to the facts either for our own consideration or for the consideration of a court on any possible review, we will direct counsel to reduce its size by the use of stipulation or otherwise.

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[1] Of course we are not now deciding whether such documents are relevant in this proceeding. That issue is still open.

Nothing in this opinion is to be construed as, in any way, reflecting our views with respect to the resolution of the substantive issues in the case.

An order will issue in accordance with this opinion.

By the COMMISSION, Commissioners HENDERSON and PIKE not participating.

UNITED STATES OF AMERICA

Before the Securities and Exchange Commission

At a regular session of the Securities and Exchange Commission, held at its office in the City of Washington, D. C., on the 30th day of July, A. D., 1940.

In the Matter of

Electric Bond and Share Company
American Power & Light Company
Pacific Power & Light Company
Electric Power & Light Corporation
Utah Power & Light Company
National Power & Light Company
Ebasco Services Incorporated

Respondents

File No. 59-12

Public Utility Holding Company Act of 1935—
Section 11 (b) (2)

ORDER.

Whereas, the Commission issued a notice and order for hearing on May 9, 1940, instituting this proceeding pursuant to Section 11 (b) (2) of the Public Utility Holding Company Act of 1935, and supplementary orders on June 7 and June 17, 1940; and

Whereas counsel for the Public Utilities Division introduced certain evidence at such hearing; and

Whereas, respondents have filed certain motions that counsel for the Public Utilities Division be directed to identify specifically those portions of the documents offered by him upon which he relies as evidence in such manner that respondents may be apprised of the facts which he contends, or will contend, establish the ultimate issues; and

Whereas, counsel for the Public Utilities Division has submitted a written Statement further specifying the particular exhibits or portions of exhibits relied upon to prove the facts which he contends establish the ultimate issues; and

Counsel for the respondents and for the Public Utilities Division having filed briefs and presented oral argument, and the Commission being fully advised in the premises and having this day filed its Opinion with respect to respondents' motions;

It is ordered that said motions are granted in the respects indicated in said Opinion and in all other respects are denied.

By the Commission.

FRANCIS P. BRASSOR, *Secretary.*

[Document No. 25.]

United States of America

Before the Securities and Exchange Commission

At a regular session of the Securities and Exchange Commission, held at its office in the City of Washington, D. C., on the 13th day of August, A. D., 1940.

Reg. No. 977604, 977605, 977685-977687

In the Matter of

Electric Bond and Share Company
American Power & Light Company
Pacific Power & Light Company

Electric Power & Light Corporation
Utah Power & Light Company
National Power & Light Company
Ebasco Services Incorporated
Respondents

File No. 59-12

Public Utility Holding Company Act of 1935—
Section 11 (b) (2)

MEMORANDUM OPINION AND ORDER.

August 16, 1940.

Appearances:

Milton H. Cohen, Esq., and Alfred Berman, Esq., for the Public Utilities Division of the Commission.

Simpson Thacher & Bartlett by John F. MacLane, Esq., and Reid & Priest by Frank A. Reid, Esq., for the respondents.

This case is now before us on the respondents' request for a continuance of the hearing.

The proceeding was instituted by the Commission under Section 11(b)(2) of the Public Utility Holding Company Act of 1935 by order dated May 9, 1940. The hearing was commenced before a trial examiner on June 18, and continued on June 19. At the hearing counsel for the Public Utilities Division offered numerous exhibits in evidence and, after such exhibits were received, stated that he believed that he had gone forward with the proof as far as was required, and urged that the evidence introduced *prima facie* established the affirmative of the issues in the case. Respondents thereupon made certain motions requesting that counsel for the Public Utilities Division be directed to identify specifically the portions of the documents offered upon which he relied as evidence in such manner that respondents might be apprised of the facts which he con-

tended, or would contend, established the ultimate issues. The hearing was adjourned pending our disposition of these motions. On July 30 we issued an opinion and order, in part granting and in part denying the motions (Holding Company Act Release No. 2196), and we ordered that the hearing be resumed on August 12.

On August 12, when the hearing was reconvened, respondents were apparently not prepared to proceed with the presentation of their evidence although more than three months had elapsed since the issuance of the order instituting the proceeding. Counsel have requested a continuance to September 9, and have stated that such a continuance is necessary, first, to formulate objections on the grounds of relevancy to certain of the documentary evidence in the record[1] and, second, for the further preparation of respondents' case. At the argument before us, in response to a question put by the chairman, counsel for the respondents stated that if the requested continuance were granted, respondents would be prepared on the resumption of the hearing to go forward continuously with their presentation, subject only to any necessary short recesses, and that respondents would make no further request for any major continuance. On this understanding, we will grant the requested continuance and we hereby order that the hearing be adjourned to be resumed at 10 A.M. on September 9, 1940, at Room 1102 of the Commission's Washington office.

By the Commission.

[SEAL] FRANCIS P. BRASSOR, *Secretary.*

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[1] We understand from counsel's statement that such objections, whether made in the form of motions or otherwise, are to be made for record purposes, and that counsel neither expects nor desires the Commission to pass upon such motions until the conclusion of the hearing.

[Document No. 26.]

United States of America

Before the Securities and Exchange Commission

In the Matter of

Electric Bond and Share Company,
American Power & Light Company,
Pacific Power & Light Company,
Electric Power & Light Corporation,
Utah Power & Light Company,
National Power & Light Company,
Ebasco Services Incorporated,
Respondents

File No. 59-12.

MOTION TO DISMISS.

[Received for Filing September 9, 1940.]

This proceeding having been instituted by the Commission pursuant to "Notice of and Order for hearing pursuant to Section 11 (b) (2) of the Public Utility Holding Company Act of 1935", dated May 9, 1940, and introduced in evidence herein as Commission Exhibit No. 1 (hereinafter referred to as "notice and order"); and

The Commission by its order dated June 7, 1940, introduced in evidence as Commission Exhibit No. 5, having ordered that the hearing herein "shall be limited initially to the issue of whether it is necessary to discontinue the existence of American Power & Light Company, Electric Power & Light Corporation, National Power & Light Company, and American & Foreign Power Company Inc., or any of them, in order to insure that the structure of the holding company system of Electric Bond and Share Company shall not be unduly or unnecessarily complicated and that voting

power shall not be unfairly or inequitably distributed among security holders of such system";

And the Commission by further order dated June 17, 1940, introduced in evidence herein as Commission Exhibit No. 10, having dismissed American & Foreign Power Company Inc., as a party to these proceedings;

And Commission counsel having offered and introduced its testimony in support of the issues tendered on the Commission's behalf and having announced that they rested the Commission's case;

The said Respondents, American Power & Light Company, Electric Power & Light Corporation and National Power & Light Company, jointly and severally move to dismiss said "notice and order" (Exhibit No. 1) in so far as it affects said respondents or any of them, and move to dismiss this proceeding as against said respondents on the following grounds, to wit:

Part I.

1. Respondents, pursuant to and in reliance on Rule 4 of the Rules and Regulations of the Securities and Exchange Commission (hereinafter called "Commission") promulgated pursuant to Section 20 of the Act, expressly reserve and refuse to waive any constitutional or legal rights, and expressly reserve the right to contest the constitutionality of any provision of the Act as applied to them or any of them, or of any rule, regulation or order now or hereafter made or purported to be made thereunder.

2. The Commission is without jurisdiction to proceed further under said notice and order, or otherwise under said Section 11(b)(2) of said Act, and the proceedings thereunder ought to be dismissed because Section 11(b)(2) of said Act is unconstitutional and void, and any enforcement thereof by the Commission would deprive respondents, and each of them as to which such enforcement should be ap-

plied, of their rights under the Constitution of the United States in that,

(a) Said Section 11(b)(2) is not a regulation of commerce, nor on the subject of bankruptcies, nor for the establishment of post offices and post roads, within the meaning of the applicable clauses of Article I, Section 8, of the Constitution of the United States, and is not within any other power vested in the Congress by said Constitution, but is an invasion of the powers reserved to the states or the people within the meaning of Article X of the amendments to the Constitution of the United States in that it seeks to interfere with and control corporations established under State laws, the exercise by them of their charter powers, and the distribution of voting power among security holders in corporations created under and governed by the laws of the various states;

(b) The enforcement of said Section 11(b)(2) or of any order made by the Commission thereunder, which would require elimination of, or a change in corporate structure of, any company in the system, or redistribution of voting power among security holders, will deprive respondents of property without due process of law in violation of Article V of the Amendments to the Constitution of the United States;

(c) Said Section 11(b)(2) delegates to the Commission legislative power of the Congress in violation of Article I, Sections 1 and 8, of the Constitution of the United States in that it affords no guide or standard or definition for the determination of what form of corporate structure may be approved by the Commission on the one hand, or held by it on the other hand to unduly or unnecessarily complicate the structure of a holding company system, or what is a fair or equitable distribution of voting power among security holders,

but entrusts such determination to the unlimited discretion of the Commission. The words used are not referable to any grant of federal power and are merely an unlimited grant of power to the Commission to make such alterations or changes in corporate structure or distribution of voting power among security holders as the Commission may deem appropriate;

(d) The Section purports to authorize abrogation and restatement of contract rights among security holders of companies not made parties respondent, and of security holders of respondent companies in proceedings to which such security holders are not parties, or capable of being made parties, and its application and enforcement would deprive such non-respondent companies and security holders of property without due process of law, in violation of Article V of the Amendments to the Constitution of the United States.

3. If, notwithstanding the foregoing, the said Section 11(b)(2) may be constitutionally applied, it may be so applied only (a) in the administration of a constitutional grant of power to the Commission to regulate corporations engaged in interstate commerce, and then only in so far as its application may constitute a regulation of interstate commerce within the powers granted to the Congress under the provisions of Article I, Section 8, of the Constitution of the United States, and none of the respondents, nor any of their subsidiaries, is either in its corporate existence or structure or in the distribution of voting rights of its security holders within the orbit of such power; (b) in the administration and exercise of the bankruptcy powers conferred upon the Congress by Article I, Section 8, of the Constitution of the United States, and none of the respondents or their subsidiaries are either insolvent or bankrupt or subject to such bankruptcy powers; or (c) as auxiliary to

a valid order made by the Commission under Section 11 (b)(1) of the Act (if said Section be constitutional, which respondents deny), after or in connection with the making of a valid order under said Section 11(b)(1) which to be effectually carried out requires a revamping of corporate structure or the elimination of some company or redistribution of voting power among security holders to effectuate the purposes of said Section 11(b)(1).

4. For the reasons, among others, stated in paragraph 3(c), *supra,* the Commission is without power to proceed with hearing in this proceeding, except after the completion of, or as auxiliary to, or in conjunction with, its proceeding under Section 11(b)(1) (File No. 59-3) now pending before the Commission. Furthermore, either completion of hearings in said File No. 59-3, or consolidation of these proceedings with those in said File No. 59-3, is essential to avoid unnecessary repetition or duplication of evidence, and to a systematic and orderly preparation and presentation of the facts involved. Until the public utility companies and properties and non-utility subsidiaries that may be permitted to remain in the System are determined under Section 11(b)(1), simplification of corporate structure or redistribution of voting power among security holders cannot be properly or intelligently applied under Section 11(b)(2). It is further essential that as preliminary to the determination of any of the questions involved in this proceeding the status of American Gas and Electric Company and its subsidiaries with respect to Bond and Share and its System be determined upon said company's application under Section 2(a)(8) which said application and the effect thereof is described in paragraph 43 of said notice and order.

5. The notice and order is defective for want of necessary parties, in that subsidiary companies of the respondents named in said notice and order and whose position and voting rights of whose securities in the System must neces-

sarily be considered and affected are not made parties; and further in that security holders of the companies affected whose rights must necessarily be involved are likewise not made parties.

6. Any effective order of the Commission redistributing voting rights of security holders of any Company in the System must of necessity affect contract and property rights of individual and corporate holders of such securities, and cannot be made in a proceeding to which said security holders are not parties.

7. Said notice and order, after describing in general terms the companies stated to constitute the Electric Bond and Share Company System, alleges in Part IX, paragraphs 46 to 48 thereof, merely in general terms (par. 46) that the structure of said System is "unduly and unnecessarily complicated"; that (par. 47) "voting power is unfairly and inequitably distributed"; and that (par. 48) said Electric Bond and Share Company "is a holding company with respect to certain subsidiary companies which themselves have subsidiary companies which are holding companies". Said notice and order contains no allegations or specifications supporting the said paragraphs 46, 47 and 48, no detail is alleged specifying in what companies, or in what respects, or in what manners, the corporate structure of the System is complicated, or voting power unfairly or inequitably distributed, fails to take into consideration the legal and economic evolution of the Bond and Share System whereby security-holders' rights became vested, and is so vague and uncertain that respondents cannot intelligently answer or proceed to hearing thereon. Such vague and indefinite allegations are not adequate notice of the proceedings to be taken by the Commission within the requirements of the due process clause of Article V of the Amendments to the Constitution of the United States, and do not satisfy the requirements of Section 11 of the said Act in that the Com-

mission has not made the examination and investigation contemplated by Section 11(a), and no valid order, such as contemplated by Section 11(b)(2), may be predicated upon said notice and order, or as a result of any hearing held thereunder.

For the reasons above stated, the Commission ought not to proceed further, the respondents should not be required to respond to said notice and order, and these proceedings should be dismissed.

Subject to the said reservation of constitutional rights and specifications of unconstitutionality, and objections above made, the respondents jointly and severally further move to dismiss said notice and order for the following reasons, to wit:

Part II.

8. The evidence offered by Commission counsel fails to establish the allegations of the Commission's notice and order contained in paragraphs 46 and 47 thereof that "the structure of the holding company system of said Electric Bond and Share Company system is unduly and unnecessarily complicated" and that "voting power is unfairly and inequitably distributed among security holders of the holding company system of said Electric Bond and Share Company".

9. The evidence offered by Commission counsel fails to establish the issue tendered by the said order of June 7, 1940, that it is necessary to discontinue the existence of American Power & Light Company, Electric Power & Light Corporation and National Power & Light Company, or any of them, in order to insure that the structure of the holding company system of Electric Bond and Share Company shall not be unduly or unnecessarily complicated, or that voting power shall not be unfairly or inequitably distributed among security holders of such systems.

10. The evidence offered by Commission counsel merely tends to establish the existence of a certain intercorporate structure and the distribution of voting power in such structure and no evidence is offered to show that such structure is unduly or unnecessarily complicated or that voting power is unfairly or inequitably distributed among security holders.

11. The exhibits offered in evidence by Commission counsel show affirmatively that respondents, American Power & Light Company, Electric Power & Light Corporation and National Power & Light Company were lawfully incorporated in accordance with the laws of the states of their incorporation, that the voting power pertaining to the various securities issued by said companies was established and determined in accordance with the laws of the states of incorporation and the charters and by-laws of said companies adopted pursuant to said laws, and that valid, legal contract rights were vested in the various security holders of said companies. Any destruction or impairment of said contract rights is beyond the powers of the Commission and would constitute deprivation of the property rights of the holders of said securities, in violation of the Fifth Amendment to the Constitution of the United States.

12. The evidence further shows that these respondents are essential component parts of the Electric Bond and Share Company system and that without them said system would cease to exist.

13. No program or plan is offered by Commission counsel, and the evidence fails to disclose any program or plan by which the termination of the existence of these respondents could be accomplished either without destruction of the holding company system of Electric Bond and Share Company, or in such manner as to protect and preserve the rights of investors and consumers.

Wherefore these respondents move for dismissal of said notice and order and of all proceedings thereunder as effecting them.

Respectively submitted,

SIMPSON THACHER & BARTLETT,
by JOHN F. MACLANE

REID & PRIEST
by FRANK A. REID

Attorneys for Respondents
AMERICAN POWER & LIGHT COMPANY
ELECTRIC POWER & LIGHT CORPORATION
NATIONAL POWER & LIGHT COMPANY

Dated September , 1940.

[DOCUMENT No. 27.]

UNITED STATES OF AMERICA

Before the Securities and Exchange Commission

In the Matter of

Electric Bond and Share Company,
American Power & Light Company,
Pacific Power & Light Company,
Electric Power & Light Corporation,
Utah Power & Light Company,
National Power & Light Company,
Ebasco Services Incorporated,
Respondents

File No. 59-12.

AMENDED ANSWER.

[Received for Filing September 9, 1940.]

Electric Bond and Share Company and the other companies above named, respondents in the "Notice of and Order for hearing pursuant to Section 11(b)(2) of the Public

Utility Holding Company Act of 1935" (said "Notice and Order", etc., is hereinafter called "Notice and Order" and said Public Utility Holding Company Act is hereinafter called "Act"), jointly and severally respond and make answer to said "Notice and Order" as follows:

This answer is submitted with respect to the above described notice and order, although not required thereby, as a statement of the above named respondents' legal position on the matters stated in said notice and order, and also for the purpose of clarifying certain factual issues to be determined upon hearing to be held pursuant thereto.

The term "System" as used herein with respect to Electric Bond and Share Company or other groups of utility properties, as well as other terms defined in the Act, except where the context otherwise requires, are used as a matter of convenience only; and any admissions, or failure to deny, statements in the notice and order, or other use of said terms herein or therein, are not to be construed as an assertion or admission of any legal implications which may be drawn from the use thereof herein or in said notice and order or of any specific corporate ownerships or intercorporate relationships. This answer is made without prejudice to the submission from time to time of complete or partial programs looking to voluntary adjustments of inter or intra corporate relationships which may meet with Commission approval and render determination of specific legal or factual issues unnecessary. Any such submission of voluntary programs is likewise without prejudice to the legal positions herein asserted.

Part I.

1. Respondents, pursuant to and in reliance on Rule 4 of the Rules and Regulations of the Securities and Exchange Commission (hereinafter called "Commission") promulgated pursuant to Section 20 of the Act, expressly reserve

and refuse to waive any constitutional or legal rights, and expressly reserve the right to contest the constitutionality of any provision of the Act as applied to them or any of them, or of any rule, regulation or order now or hereafter made or purported to be made thereunder.

2. The Commission is without jurisdiction to proceed further under said notice and order, or otherwise under said Section 11(b)(2) of said Act, and the proceedings thereunder ought to be dismissed because Section 11(b)(2) of said Act is unconstitutional and void, and any enforcement thereof by the Commission would deprive respondents, and each of them as to which such enforcement should be applied, of their rights under the Constitution of the United States in that,

(a) Said Section 11(b)(2) is not a regulation of commerce, nor on the subject of bankruptcies, nor for the establishment of post offices and post roads, within the meaning of the applicable clauses of Article I, Section 8, of the Constitution of the United States, and is not within any other power vested in the Congress by said Constitution, but is an invasion of the powers reserved to the states or the people within the meaning of Article X of the amendments to the Constitution of the United States in that it seeks to interfere with and control corporations established under State laws, the exercise by them of their charter powers, and the distribution of voting power among security holders in corporations created under and governed by the laws of the various states;

(b) The enforcement of said Section 11(b)(2) or of any order made by the Commission thereunder, which would require elimination of, or a change in corporate structure of, any company in the system, or redistribution of voting power among security holders, will de-

prive respondents of property without due process of law in violation of Article V of the Amendments to the Constitution of the United States;

(c) Said Section 11(b)(2) delegates to the Commission legislative power of the Congress in violation of Article I, Sections 1 and 8, of the Constitution of the United States in that it affords no guide or standard or definition for the determination of what form of corporate structure may be approved by the Commission on the one hand, or held by it on the other hand to unduly or unnecessarily complicate the structure of a holding company system, or what is a fair or equitable distribution of voting power among security holders, but entrusts such determination to the unlimited discretion of the Commission. The words used are not referable to any grant of federal power and are merely an unlimited grant of power to the Commission to make such alterations or changes in corporate structure or distribution of voting power among security holders as the Commission may deem appropriate;

(d) The Section purports to authorize abrogation and restatement of contract rights among security holders of companies not made parties respondent, and of security holders of respondent companies in proceedings to which such security holders are not parties, or capable of being made parties, and its application and enforcement would deprive such non-respondent companies and security holders of property without due process of law, in violation of Article V of the Amendments to the Constitution of the United States.

3. If, nothwithstanding the foregoing, the said Section 11(b)(2) may be constitutionally applied, it may be so applied only (a) in the administration of a constitutional grant of power to the Commission to regulate corporations

engaged in interstate commerce, and then only in so far as its application may constitute a regulation of interstate commerce within the powers granted to the Congress under the provisions of Article I, Section 8, of the Constitution of the United States, and none of the respondents, nor any of their subsidiaries, is either in its corporate existence or structure or in the distribution of voting rights of its security holders within the orbit of such power; (b) in the administration and exercise of the bankruptcy powers conferred upon the Congress by Article I, Section 8, of the Constitution of the United States, and none of the respondents or their subsidiaries are either insolvent or bankrupt or subject to such bankruptcy powers; or (c) as auxiliary to a valid order made by the Commission under Section 11 (b)(1) of the Act (if said Section be constitutional, which respondents deny), after or in connection with the making of a valid order under said Section 11(b)(1) which to be effectually carried out requires a revamping of corporate structure or the elimination of some company or redistribution of voting power among security holders to effectuate the purposes of said Section 11(b)(1).

4. For the reasons, among others, stated in paragraph 3(c), *supra*, the Commission is without power to proceed with hearing in this proceeding, except after the completion of, or as auxiliary to, or in conjunction with, is proceeding under Section 11(b)(1) (File No. 59-3) now pending before the Commission. Furthermore, either completion of hearings in said File No. 59-3, or consolidation of these proceedings with those in said File No. 59-3, is essential to avoid unnecessary repetition or duplication of evidence, and to a systematic and orderly preparation and presentation of the facts involved. Until the public utility companies and properties and non-utility subsidiaries that may be permitted to remain in the System are determined under Section 11(b)(1), simplification of corporate structure or

redistribution of voting power among security holders cannot be properly or intelligently applied under Section 11 (b)(2). It is further essential that as preliminary to the determination of any of the questions involved in this proceeding the status of American Gas and Electric Company and its subsidiaries with respect to Bond and Share and its System be determined upon said company's application under Section 2(a)(8) which said application and the effect thereof is described in paragraph 43 of said notice and order.

5. The notice and order is defective for want of necessary parties, in that subsidiary companies of the respondents named in said notice and order and whose position and voting rights of whose securities in the System must necessarily be considered and affected are not made parties; and further in that security holders of the companies affected whose rights must necessarily be involved are likewise not made parties.

6. Any effective order of the Commission redistributing voting rights of security holders of any company in the System must of necessity affect contract and property rights of individual and corporate holders of such securities, and cannot be made in a proceeding to which said security holders are not parties.

7. Said notice and order, after describing in general terms the companies stated to constitute the Electric Bond and Share Company System, alleges in Part IX, paragraphs 46 to 48 thereof, merely in general terms (par. 46) that the structure of said System is "unduly and unnecessarily complicated"; that (par. 47) "voting power is unfairly and inequitably distributed"; and that (par. 48) said Electric Bond and Share Company "is a holding company with respect to certain subsidiary companies which themselves have subsidiary companies which are holding companies". Said notice and order contains no allegations or specifica-

tions supporting the said paragraphs 46, 47 and 48, no detail is alleged specifying in what companies, or in what respects, or in what manners, the corporate structure of the System is complicated, or voting power unfairly or inequitably distributed, fails to take into consideration the legal and economic evolution of the Bond and Share System whereby security-holders' rights became vested, and is so vague and uncertain that respondents cannot intelligently answer or proceed to hearing thereon. Such vague and indefinite allegations are not adequate notice of the proceedings to be taken by the Commission within the requirements of the due process clause of Article V of the Amendments to the Constitution of the United States, and do not satisfy the requirements of Section 11 of the said Act in that the Commission has not made the examination and investigation contemplated by Section 11(a), and no valid order, such as contemplated by Section 11(b)(2), may be predicated upon said notice and order, or as a result of any hearing held thereunder.

For the reasons above stated, the Commission ought not to proceed further, the respondents should not be required to respond to said notice and order, and these proceedings should be dismissed.

Subject to the said reservation of constitutional rights and specifications of unconstitutionality, and objections above made, the respondents jointly and severally answer said notice and order as follows:

Part II

For a first defense:

8. Electric Bond and Share Company (hereinafter called "Bond and Share") admits, except as hereinafter denied or qualified, the allegations of Part I, paragraphs 1 to 8, inclusive, of the Commission's "notice and order".

Referring to paragraph 3, the descriptions of stocks of

Bond and Share issued and outstanding therein contained are in all respects subject to the provisions of the statutes pursuant to which the same were issued and to the provisions of its charter, by-laws and other related corporate documents. Further referring to the statement of paragraph 3 that "no dividends in cash have been declared or paid on the common stock (of Bond and Share) since organization of the present company in 1929" this respondent states that said organization was a consolidation or merger under the New York statutes of (old) Electric Bond and Share Company, a New York corporation organized in 1905, with its then parent company, Electric Bond and Share Securities Corporation, and that prior to such consolidation or merger full cash dividends on preferred stock had been regularly paid since the original issue of such stock and cash dividends on common stock had been regularly paid by said (old) Electric Bond and Share Company to said parent company, and by said parent company to the public for several years.

With respect to the statements of paragraph 6, this respondent admits that it owns approximately the percentage of shares of various classes of capital stock of the companies shown in the table, but alleges that such percentage of ownership is not indicative of percentage of voting power, but that such percentage is stated approximately correctly, for companies other than American Gas & Electric Company, in the table referred to in paragraph 9 of the notice and order and attached thereto as "Exhibit A". The exact number of shares outstanding of each class of stock, the number of shares owned by Bond and Share, and the resulting percentages for each class and of aggregate voting power will be adduced upon the hearing held hereunder.

With respect to the statements of paragraph 7, Bond and Share challenges the relevance of the comparisons between consolidated assets and market values of voting securities

held by Bond and Share in the companies therein listed as of December 31, 1938, or subsequently, and denies that any such comparisons are material or relevant to any issue herein. Further answering, Bond and Share has no knowledge, information or belief sufficient to enable it to answer as to the market value of voting securities of the several companies held by it as of December 31, 1938, or as of any other date, and, therefore, denies the statements of market value of voting securities held by Bond and Share in the companies therein described. Bond and Share further alleges, if such comparisons be relevant, that market values of such voting securities have been and are subject to wide fluctuations, and that for a substantial period of its existence, a computation of market quotations of the voting securities held by it in said companies, based on actual sales but applied to the number of shares held, the aggregate far exceeded their book values as shown by consolidated assets, and that market values so computed established substantially higher ratios to consolidated assets.

9. American Power & Light Company (hereinafter called "American Company") admits, except as hereinafter denied or qualified, the allegations of Part II, paragraphs 10 to 19, inclusive, of the Commission's notice and order.

Referring to paragraph 12, the description of stocks of American Company issued and outstanding are in all respects subject to, and qualified by, the provisions of the statutes pursuant to which the same were authorized and issued and to the provisions of its charter, by-laws and other related corporate documents. Further referring to the allegations of paragraph 12, as to the unpaid cumulative dividends on preferred stock, and non-payment of dividends on common stock, since June 1, 1932, this respondent states that dividends were paid on preferred stock continuously since the first issue of such stock in 1909 at the rates provided by the by-laws and stock certificates until the year

1932, a period of 23 years. That since the year 1932 partial dividends have been paid in every year. That arrearages have accumulated because of business depression, increased taxes and other uncontrollable expenses of operating subsidiaries, and that within any reasonable period of general business prosperity arrearages would be eliminated.

With respect to the statement that no dividends have been paid on common stocks since June 1, 1932, this respondent states that such dividends were paid every year beginning with the year 1913 up to and including the year 1932, and that the suspension of such dividends has been due to the causes above stated.

Answering paragraph 14, this respondent states that Yakima Credit Corporation is not in fact controlled or operated as a subsidiary of either Bond and Share, American Company or Pacific Power & Light Company. Pacific Power & Light Company's position, with respect to such Yakima Credit Corporation, is merely that of a minority stockholder owning approximately an 11.23% interest in the voting securities.

Referring to paragraph 15, this respondent states that unpaid cumulative dividends in arrears on preferred stock of subsidiary companies consist of arrearages on preferred stock of Florida Power & Light Company and Portland Gas & Coke Company. That all the other public utility operating companies are paying full preferred dividends and have generally continued to pay such dividends. The unpaid dividends on preferred stock of Florida Power & Light Company are currently being reduced. As to Portland Gas & Coke Company, respondent American Company has recently subscribed for and purchased 6,000 additional shares of its common stock, the proceeds from which make possible the construction of new process by-products plants which give promise of a return such as will enable Portland Gas

& Coke Company to pay in full the arrearages on its preferred stock.

10. Pacific Power & Light Company (hereinafter called "Pacific Company") admits the allegations of paragraphs 17 to 19, inclusive, of Part II of the Commission's notice and order, subject to the qualification that as to paragraph 19, the description of stocks of Pacific Company issued and outstanding are in all respects subject to, and qualified by, the provisions of the statutes pursuant to which the same were authorized and issued and to the provisions of its charter, by-laws and other related corporate documents.

11. Electric Power & Light Corporation (hereinafter called "Electric Company") admits, except as hereinafter denied or qualified, the allegations of Part III, paragraphs 20 to 29, inclusive, of the Commission's notice and order.

Referring to paragraph 22, the description of stocks of Electric Company issued and outstanding are in all respects subject to, and qualified by, the provisions of the statutes pursuant to which the same were authorized and issued and to the provisions of its charter, by-laws and other related corporate documents. Further referring to paragraph 22, this respondent alleges that dividends on both preferred and second preferred stocks of Electric Company were paid regularly, continuously and in full from the organization of the company in 1925 until the middle of 1932. The discontinuance of such dividends since 1932 has been due to continuous business depression in areas served by subsidiary companies and to increases in taxes and other uncontrolable expenses of operating subsidiaries. It is hoped to resume at least partial dividends on preferred stock of Electric Company at an early date. Dividends were paid on common stock continuously from 1928 to the middle of 1932.

With respect to the allegations of paragraph 25, as to unpaid dividends on preferred stocks of subsidiary companies, Electric Company states that as of May 31, 1940 all

electric utility subsidiaries, except Utah Power & Light Company and Mississippi Power & Light Company, have made up all preferred stock dividend arrearages.

Of the $68,404,705.42 of unpaid cumulative dividends in arrears on preferred stocks of subsidiaries as of December 31, 1938, $6,961,107.42 represents such unpaid dividends on preferred stock of Utah Power & Light Company, and $11,564,173.92 on preferred stock and $42,317,193.33 on second preferred stock (all of which latter stock is owned by Electric Company) of United Gas Corporation.

The accumulated arrearages of dividends on preferred stock of Utah Power & Light Company have been due, in addition to the general conditions above stated of business depression and increased expense, to conditions peculiar to that company, viz. the low average rate of mining operations from 1930 to 1939, inclusive, in the territory served from which a large portion of the revenues of such company is obtained, and to an exceptional and almost continuous drought condition which has prevailed in the water shed upon which its principal hydro electric plants are dependent, resulting in the necessity of large purchases of power, increased cost of steam plant operation, and the use of current funds for the construction of additional steam plants which would not have been required had normal water conditions prevailed.

United Gas Corporation has, on a consolidated basis, in every year, save one, since the acquisition by Electric Company of its stock interest therein in 1930 earned its full preferred dividend and has shown substantial earnings applicable to second preferred dividends.

Because of its cash requirements in developments and extension of its facilities, and its inability, under conditions which have existed in recent years, to reimburse its treasury through ordinary financing free from burdensome restrictions, United Gas Corporation has not been able at all times

to make payments of such preferred dividends in full, and no second preferred dividends have been paid since April 1, 1932. However, since September 1, 1936, dividends on the $7 preferred stock were regularly paid at the full annual rate up to September 1, 1939 upon which date and quarterly thereafter, dividends have been paid at an annual rate of $9 per share, thus reducing accumulated arrearages.

12. Utah Power & Light Company (hereinafter called "Utah Company") admits, except as hereinafter denied or qualified, the allegations of paragraphs 27 to 29, inclusive, of the Commission's notice and order. With respect to the allegations of paragraph 29, as to cumulative preferred dividends in arrears, alleges that said Utah Company paid dividends continuously on its preferred stock from the dates of issue thereof, commencing in 1913 up to and including 1932. The suspension of such dividends has been due to the causes above alleged. Dividends were paid on common stock continuously from 1925 to 1932, inclusive. Referring further to paragraph 29, the description of stocks of Utah Company issued and outstanding are in all respects subject to, and qualified by, the provisions of the statutes pursuant to which the same were authorized and issued and to the provisions of its charter, by-laws and other related corporate documents.

13. National Power & Light Company (hereinafter called "National Company") admits, except as hereinafter denied or qualified, the allegations of Part IV, paragraphs 30 to 36, inclusive, of the Commission's notice and order.

Referring to paragraph 35, the description of stocks of National Company issued and outstanding are in all respects subject to, and qualified by, the provisions of the statutes pursuant to which the same were authorized and issued and to the provisions of its charter, by-laws and other related corporate documents. Further referring to the allegations of paragraph 35 as to unpaid cumulative

dividends in arrears on preferred stocks of subsidiary companies, this respondent states that as of this date such arrearages consist solely of arrearages on preferred stocks of Lehigh Valley Transit Company, substantially all of which are owned by National Company. All other arrearages have been made up.

14. No answer is made with respect to the allegations of Part V, paragraphs 37 to 42, inclusive, of said notice and order because American & Foreign Power Company Inc., while originally named as respondent in said notice and order, has been dismissed as a party to these proceedings by order of the Commission dated June 17, 1940 and filed herein as Commission's Exhibit No. 10.

15. No answer is made with respect to the allegations of Part VI, paragraph 43, of said notice and order because American Gas and Electric Company has not been made a party to this proceeding.

16. Ebasco Services Incorporated (hereinafter called "Ebasco") admits the allegations of Part VII, paragraph 44, of said notice and order, and alleges that services performed by it, as therein described, are rendered, as to domestic operating companies, at cost, and in all respects in accordance with the requirements of Section 13 of the Act, and it has filed with the Commission its application for approval of its service arrangements. Hearing has been had thereon but the Commission has not entered an order with respect to the same.

17. Each of the respondents hereto adopts, on information and belief, the admissions, denials and qualifications of the foregoing answer made by the other respondents, so far as answer by each may be appropriate to those parts and paragraphs of the notice and order not directly applicable to it.

18. Each of the respondents, jointly and severally, in an-

swer to Part IX, paragraphs 46 to 48, inclusive, of the Commission's notice and order:

Denies (paragraph 46) that the structure of the holding company system of Bond and Share is either unduly or unnecessarily complicated;

Denies (paragraph 47) that voting power is unfairly or inequitably distributed among security holders of the holding company system or of respondents, or any of them;

Admits (paragraph 48) that Bond and Share is a holding company with respect to certain subsidiary companies which themselves have subsidiary companies which are holding companies, but with respect thereto alleges that such condition exists only in relation to the situations described in paragraph 21 hereof.

19. Further answering paragraph 46, respondents state affirmatively that the holding company system of Bond and Share is simple and free from complications. This is evidenced by the chart attached to Commission's notice and order as Exhibit "A". Neither the corporate structure nor continued existence of any company in the system, unduly or unnecessarily complicates such structure, or unfairly or inequitably distributes voting power.

It has been and is the consistent policy in the Bond and Share System to consolidate operating companies in the same territory into single simple corporate structures, the securities of which consist almost uniformly of first mortgage bonds, preferred stock and common stock. Underlying or divisional mortgages have been refunded. Intermediate obligations between bonds and stock have been resorted to only in a few cases where required by some existing financial problem which could not be met by ordinary financing, and, in such cases, such intermediate obligations consist of relatively small issues of long term "debenture" notes or ordinary short term notes.

In carrying out this policy, on the completion of organiza-

tion and during the development and expansion of operating public utility subsidiaries, the existing operating electric utilities have merged, consolidated or acquired the properties of several thousand separate corporations. As an example, upon its organization in 1930, the United Gas Corporation group included approximately 50 companies. Since that date this number has been reduced to 10.

From 1928 to 1939, inclusive, the following intermediate holding companies were either liquidated or ceased to be holding companies within the definition of the Act: in the American Company system, Southwestern Power & Light Company, The Washington Water Power Company, Nebraska Power Company and The Montana Power Company; in the Electric Company System, Power Securities Corporation, Idaho Power Company, Louisiana Power & Light Company, Mississippi Power & Light Company, Dixie Gas and Utilities Company, Southern Gas Company, South Texas Gas Company, South Texas Pipe Line Company, Louisiana Gas & Fuel Company, Gas & By-Products Company, Moody Seagraves Gas Co., Inc., The Palmer Corporation of Louisiana, Northern Louisiana Gas Company, United Gas Corporation, United Gas Public Service Company and Houston Gulf Gas Company; in the National Company system Lehigh Power Securities Corporation, Pennsylvania Power & Light Company, Easton Consolidated Electric Company, Lehigh Valley Transit Company, Lancaster County Railway and Light Company, Valley Railways, Harrisburg Light and Power Company, Edison Electric Company and Lancaster Gas Light & Fuel Company.

Simplification of corporate structure is slow by reason of State and Federal laws, tax problems and other reasons. Further simplification is being pressed forward as fast as practicable.

20. Further answering paragraph 47, respondents affirmatively allege that voting power is fairly and equitably dis-

tributed among security holders. Each share of stock, common or preferred, is ordinarily entitled to a single vote. Exceptions are stated in the margin.* No company or class of stock has been artificially interposed to deflect voting power from its normal channels. On the original incorporation and distribution of stocks of companies in the system, voting power has been distributed among the security holders who have furnished the risk or equity capital or service involved in starting and continuing the company on its course, and however the voting power may have been distributed between the securities issued to the persons so furnishing capital or service, such distribution has been fixed in accordance with applicable laws and charter provisions and stated in the stock certificates, so that subsequent purchasers of any classes of securities were advised of and

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* Holders of the following securities outstanding with the public have limited voting rights:

Florida Power & Light Company
$7 Preferred Stock
Kansas Gas and Electric Company
$6 Preferred Stock
Pacific Power and Light Company
$6 Preferred Stock
The Washington Water Power Company
$6 Preferred Stock
Electric Power & Light Corporation
$7 Second Preferred Stock, Series A
United Gas Corporation
$7 Preferred Stock
Houston Gulf Gas Company
7% Preferred Stock, Series A
7% Preferred Stock, Series B
New Orleans Public Service Inc.
Preferred Stock
National Power & Light Company
$6 Preferred Stock
Birmingham Electric Company
$7 Preferred Stock
$6 Preferred Stock.

The $7 Second Preferred Stock of United Gas Corporation is entitled to three votes per share.

knew when they purchased their securities the voting power pertaining thereto, and the distribution of voting power among security holders. The distribution of voting power between the security holders has been a matter of private contract, fairly and equitably arrived at and fairly and equitably maintained.

While voting control is usually held by the common stock, this is the accepted and customary method of distributing voting power, and is essential to common stock financing. Since the common stock is only entitled to dividends after all debt obligations and preferred stock dividend requirements are met, the common stock must of necessity control the corporation to realize earnings and payment of dividends on such stock. If control were vested in creditors they would have no interest in the payment and little interest in earning of dividends for either preferred or common stock so long as their debt requirements were satisfied and similarly if control were vested in preferred stock-holders they would have no interest in the payment and little interest in the earnings of dividends on junior stocks.

21. Further answering paragraph 48, Pacific Company and Utah Company are the only subsidiary companies of subsidiary holding companies which are themselves holding companies within the definitions of the Act.

Pacific Company is primarily an operating utility. It is a holding company only by reason of its ownership of the stock of Inland Power & Light Company. Said latter company is a public utility operating in the same territory as Pacific Company.

Pacific Company, having previously received the approval of the Public Utility Commissions of the states of Washington and Oregon, filed on June 11, 1937, with the Federal Power Commission and application for approval of the acquisition of the physical properties of Inland Power & Light Company. The Federal Power Commission denied

such application by order issued on December 14, 1937. Pacific Company promptly appealed to the Circuit Court of Appeals for the Ninth Circuit from such order of denial, and, thereupon, the Federal Power Commission moved to dismiss said appeal. Said motion was denied by the Circuit Court of Appeals by order dated September 6, 1938. The Federal Power Commission sought and obtained a review of said order of the Circuit Court of Appeals on certiorari to the Supreme Court of the United States, where said order was affirmed by decision dated April 17, 1939. The Circuit Court of Appeals has recently, on May 8, 1940, rendered its decision and entered its order reversing the order of the Federal Power Commission, and returning the matter to the Commission for further consideration in harmony with its said decision. Pacific Company proposes to diligently prosecute the proceedings before the Federal Power Commission, and upon the entry of an appropriate order by the Federal Power Commission granting its application, and the satisfaction of any other legal requirements, Pacific Company will cease to be a holding company.

Utah Company is primarily an operating public utility. It is a holding company only by reason of its ownership of the stocks of Utah Light & Traction Company and The Western Colorado Power Company, public utilities in the same or contiguous territory to that served by Utah Company.

Utah Company has had under consideration for many months last past a plan for the acquisition of the public utility properties of both Utah Light & Traction Company and The Western Colorado Power Company. Said plan has been completed in tentative form and submitted to counsel for consideration and approval as to the legal steps and formalities, and upon its approval by counsel will be promptly submitted to the requisite governmental authori-

ties having jurisdiction, including this Commission. Upon approval by such governmental authorities, Utah Company will cease to be a holding company.

Part III.

For a second defense:

22. Electric Bond and Share Company ("Bond and Share") is a New York corporation having its principal place of business at Two Rector Street, New York, N. Y. At no time has it qualified to do business as a foreign corporation in any other state.

23. Bond and Share has no funded debt and no floating or current liabilities other than current tax accruals and current operating expense, such current liabilities amounting to a small fraction of current assets. Its presently outstanding capital stock consists of the following:

Class	No. of Shares Outstanding
$6 Preferred Stock	1,155,655
$5 Preferred Stock	300,000
Common Stock	5,250,358

Each share of stock is entitled to one vote.

24. Bond and Share as of May 31, 1940 owned the following voting securities of American Gas and Electric Company ("American Gas"), American Power & Light Company ("American Company"), National Power & Light Company ("National Company"), Electric Power & Light Corporation ("Electric Company"), United Gas Corporation ("United Company"), and American & Foreign Power Company Inc. ("Foreign Company") which represented the following percentages of the total outstanding voting securities of each of said companies:

Company and Class of Stock	No. of Shares Held	Percentage of Outstanding Voting Securities
American Gas		
Common Stock	846,985	17.51%
American Company		
$5 Preferred Stock	51,840	20.70%
Common Stock	937,221	
National Company		
Common Stock	2,540,450	46.56%
Electric Company		
$7 Preferred Stock	485	46.85%
Common Stock	1,976,638	
United Company		
Common Stock	752,666	7.19%
Foreign Company		
Common Stock	881,500	42.30%

25. Bond and Share owns all the outstanding capital stock of Ebasco Services Incorporated ("Ebasco") which furnishes technical and specialized services to subsidiaries of respondents. Said services are economically and efficiently performed and as to domestic operating companies are rendered at cost, conforming to the requirements of Section 13 of the Act, and are essential to efficiency and economy of operation of the public utility subsidiaries in the Bond and Share System, and to the successful functioning of said System.

Bond and Share owns no voting securities of any of the other respondents, or their subsidiaries, other than those hereinabove set forth. It does, however, own non-voting securities of certain of the respondents and their subsidiaries.

26. American Gas is a New York corporation, having its principal place of business at 30 Church Street, New York, N. Y. The presently outstanding securities of American Gas consist of the following:

Sinking Fund 2¾% Debentures, Series due January 1, 1950, $8,000,000.

Sinking Fund 3½% Debentures, Series due January 1, 1960, $10,000,000.

Sinking Fund 3¾% Debentures, Series due January 1, 1970, $12,000,000.

4¾% Cumulative Preferred Stock, Par Value $100, 355,623 shares.

Common Stock, Par Value $104,482,737 shares.

Further answer to allegations of the notice and order with respect to American Gas and its subsidiaries is not made at this time for the reason that American Gas is not made a respondent by the notice and order.

27. American Company is a Maine corporation having executive offices at Two Rector Street, New York, N. Y. It has at no time qualified to do business as a foreign corporation in any state.

28. The presently outstanding securities of American Company consist of the following:

Gold debenture bonds, American 6% series, due March 1, 2016	$42,358,000	
6% Gold debenture bonds, series A. due March 1, 2022, of Southwestern Power & Light Company (assumed by American Company)	$3,903,000	
$6 Preferred Stock	793,581	2/10 shares
$5 Preferred Stock	978,444	shares
Common Stock	3,008,511	27/50 shares

29. American Company owns outstanding voting securities of the following utility companies representing the per-

centages of the total outstanding voting securities of such companies set opposite their respective names:

Central Arizona Light and Power Company	98.04%
Florida Power & Light Company	100.00%
Kansas Gas and Electric Company	90.55%
Minnesota Power & Light Company	93.04%
The Montana Power Company	93.73%
Nebraska Power Company	89.90%
New Mexico Electric Service Company	99.99%
Northern Power Company	98.80%
Northwestern Electric Company	67.65%
Pacific Power & Light Company which Company owns in turn 99.95% of the voting securities of Inland Power & Light Company.	94.66%
Portland Gas & Coke Company	83.23%
Superior Water, Light and Power Company	66.58%
Texas Electric Service Company	98.97%
Texas Power & Light Company	96.77%
Texas Public Utilities Corporation	99.98%
The Washington Water Power Company	99.69%

30. In addition to voting securities of the companies named in paragraph 29 hereof, American Company, or its subsidiaries, own all or substantial blocks of the outstanding voting securities of certain non-utility companies, which are generally described in Part II of the notice and order, paragraph 14 as well as of certain inactive companies not named therein.

31. Electric Company is a Maine corporation having executive offices at Two Rector Street, New York, N. Y. It has at no time qualified to do business as a foreign corporation in any State.

32. The presently outstanding securities of Electric Company consist of the following:

Gold Debentures, 5% Series, due February 1, 2030	$31,000,000	
Collateral Trust Gold Bonds, American 6% Series, due June 1, 1949 of Power Securities Corporation (assumed by Electric Company)	$ 971,225.07	
$7 Preferred Stock	514,162	shares
$6 Preferred Stock	255,427	shares
Second Preferred Stock, Series A	78,164	shares
Common Stock	3,440,387	shares

33. Electric Company owns outstanding voting securities of the following utility companies representing the percentages of the total outstanding voting securities of such companies set opposite their respective names:

Arkansas Power & Light Company	90.22%
Dallas Power & Light Company	70.00%
Idaho Power Company	71.76%
Louisiana Power & Light Company	95.43%
Mississippi Power & Light Company	94.03%
New Orleans Public Service Inc.	95.14%
United Gas Corporation	61.58%
Utah Power & Light Company	92.39%

which Company owns in turn all of the voting securities, other than directors' qualifying shares, of

Utah Light and Traction Company and
The Western Colorado Power Company

34. In addition to voting securities of the companies named in paragraph 33 hereof, Electric Company, or its subsidiaries, own all or substantial blocks of the outstanding voting securities of certain non-utility companies, which are generally described in Part III of the notice and order, paragraph 24.

35. National Company is a New Jersey corporation having executive offices at Two Rector Street, New York, N. Y. It has at no time qualified to do business as a foreign corporation in any State.

36. The presently outstanding securities of National Company consist of the following:

Six Per Cent. Gold Debentures, Series A, due August 1, 2026	$8,775,000
Five Per Cent. Gold Debentures, Series B, due May 1, 2030	$8,959,000
Lancaster County Railway and Light Company, Fifty-Year Five Per Cent. Collateral Trust Mortgage Gold Bonds, due July 1, 1951	$ 370,500
$6 Preferred Stock	279,716 shares
Common Stock	5,456,117 shares

37. National Company owns outstanding voting securities of the following utility companies representing the percentages of the total outstanding voting securities of such companies set opposite their respective names:

Birmingham Electric Company	100.00%
Carolina Power & Light Company	93.53%
The Edison Illuminating Company of Easton	100.00%
Houston Lighting & Power Company	91.32%
Lehigh Valley Transit Company	98.17%
Memphis Generating Company	100.00%
Pennsylvania Power & Light Company	75.63%
Roanoke River Power Company	100.00%
West Tennessee Gas Company	100.00%

38. In addition to the voting securities of the companies

named in paragraph 37 hereof, National Company, or its subsidiaries, own all or substantial blocks of the outstanding voting securities of certain non-utility companies, which are generally described in Part IV of the notice and order, paragraph 34.

39. Pacific Power & Light Company, described in the notice and order as a holding company, is a Maine corporation qualified to do business in the State of Oregon and the adjacent State of Washington, in which States it operates primarily as a public utility. Its principal office for the transaction of business is located in Portland, Oregon.

40. The presently outstanding securities of Pacific Power & Light Company consist of the following:

First Mortgage and Prior Lien Gold Bonds, 5% Series, due 1955	$20,500,000
7% Preferred Stock	58,100 shares
$6 Preferred Stock	10,585 shares
Common Stock	1,000,000 shares

In addition, American Company holds note indebtedness of Pacific Power & Light Company in the amount of $2,794,500.

41. Pacific Power & Light Company is only incidentally a holding company by reason of its ownership of all of the stock, except directors' qualifying shares, of Inland Power & Light Company, which operates in the same territory.

42. Utah Power & Light Company, described in the notice and order as a holding company, is a Maine corporation qualified to do business in the State of Utah and the adjacent States of Idaho and Wyoming, in which States it operates primarily as a public utility. Its principal office for the transaction of business is located in Salt Lake City, Utah.

43. The presently outstanding securities of Utah Power & Light Company consist of the following:

Thirty Year First Mortgage Five Per Cent. Gold Bonds due 1944	$29,373,000	
First Lien and General Mortgage Gold Bonds, Series of "4½s due 1944"	$ 4,234,000	
Six Per Cent. Gold Debenture Bonds, Series A, due 2022	$ 5,000,000	
$6 Preferred Stock	41,921	shares
$7 Preferred Stock	207,605	shares
Common Stock	3,000,000	shares

Utah Power & Light Company is guarantor of the payment of the principal of and interest on $12,183,000 principal amount of Thirty-Year First and Refunding Mortgage Gold Bonds, Series A, 5%, due 1944, of Utah Light and Traction Company.

44. Utah Power & Light Company is only incidentally a holding company by reason of its ownership of all of the stock, except directors' qualifying shares, of Utah Light and Traction Company, whose properties are located in the same territory, and of The Western Colorado Power Company, which owns and operates public utility properties in western Colorado.

45. All securities issued by Bond and Share and the other respondents hereto, and all securities issued by the subsidiaries of any of said respondents, were lawfully created and issued in accordance with the applicable laws of the states of incorporation of said respondents and their subsidiaries, respectively, and as authorized or permitted by the laws of the states in which such respondents and their subsidiaries are doing business, if in different states than those of incorporation, and also in accordance with lawfully adopted and applicable provisions of charters, certificates of organization and/or by-laws of said companies respec-

tively. By said charters, certificates, by-laws, or other appropriate corporate documents, the voting powers of the respective classes of securities were fixed and determined, and the securities, when issued and sold, carried with them the voting rights which they now carry (except to the extent that the same have been modified by corporate action, including stockholders' vote, duly taken in accordance with charter and statutory provisions), and such securities were delivered for property or sold for cash, with such voting rights attached and with knowledge of the recipient or purchaser of the voting rights and resulting distribution of voting power. All security issues of respondents and, with few exceptions, all security issues of their subsidiaries, were issued and voting rights established prior to the enactment of the Public Utility Holding Company Act of 1935, and the voting and other rights appertaining to such securities were at the time of the enactment of said Act valid, existing and outstanding contract and property rights. In no case were such securities issued, distributed or acquired in violation of any law, federal or state, and the titles and rights held and exercised by Bond and Share and the other respondents and other stockholders in respect thereto are valid, legal, existing property rights of which they may not be deprived (unless taken for other public use with just compensation, as required by Article V of the amendments to the Constitution of the United States), and any involuntary impairment or violation of any of respondents', or any other stockholder's, vote, or other titles or rights thereunder, would be without due process of law, in violation of said Article V of the amendments to the Constitution of the United States.

46. Neither Bond and Share nor the other holding company respondents (other than Pacific Company and Utah Company) are themselves engaged in interstate or foreign commerce nor in any transactions affecting interstate or foreign commerce. In so far as any one of them may be

subject to federal regulation, it is so subject by reason of interstate commerce done by direct or indirect "subsidiaries", as defined by the Act and not by reason of any business done by it in its own corporate capacity. All public utility subsidiaries are engaged primarily in intrastate public utility business within the states in which they respectively operate, and such of them as are engaged in interstate commerce are so engaged only incidentally to their intrastate public utility business. Non-utility subsidiaries, with few exceptions, are engaged solely in intrastate business within the states in which they respectively operate. Neither Bond and Share nor any of the other respondents control, obstruct, impede or in anywise affect the interstate or foreign commerce done by said subsidiaries, nor does the present corporate existence or structure, or the present distribution of voting power, of any company in the system, affect such interstate or foreign commerce or any other matter of federal jurisdiction.

Part IV.

For a further defense:

47. Section 11(b) of the Act directs that any order of the Commission thereunder shall be made "as soon as practicable" after January 1, 1938, and by Section 11(c) such order is required to be complied with "within one year from the date of such order" subject to power of the Commission to extend said date for not to exceed one year. In view of the provisions throughout the Act making the public interest and the protection of investors and consumers the guiding principle for its interpretation and application, an order of the Commission under Section 11(b)(2) should not be made at such time or in such manner as to prejudice the interest of investors, consumers, or the public.

48. It is not practicable at the present time or under present conditions to enforce application of Section 11(b)(2)

with respect to the Bond and Share System or its component parts or to conduct hearings looking to application of said section to companies in said System.

49. The problem of collecting and correlating information and conducting a hearing is now complicated in a manner and to an extent not heretofore contemplated by the urgent demands on the staffs of respondents and their subsidiaries in connection with problems concerning the national defense. It is of vital public concern that operating companies in the System prepare themselves for all foreseeable eventualities which may locally arise in regard thereto. A number of executives and others who will be required as witnesses in connection with this proceeding, or whose time, in part at least, is required in the preparation for hearing, are specially qualified to give attention now to the studies and other work which utilities are doing and should continue to do in connection with local preparations for the national defense. It is not in the public interest or in the interest of the companies, consumers or security holders of the Bond and Share System, that this work should in any way be hampered or delayed as may be the case if respondents are required to prepare for and participate in an early hearing in this proceeding.

50. Holding companies in the Bond and Share System were particularly effective in maintaining adequate utility service and providing necessary financial support to operating companies during the last World War, and American Company, Electric Company, National Company and Bond and Share can and will, if allowed to continue in existence unhampered by the necessity of devoting the major portion of the time of their executives to extraneous matter, function with similar effectiveness in connection with the national preparedness program or any other national emergency which may eventuate. It is in the public interest and the interest of investors and consumers that the continued

existence of these companies should not be disturbed during the present national emergency.

51. Due to the present World War, financial and money markets are in an unsettled and disturbed condition; several sales of securities have already been postponed and the issuance of any order under Section 11(b)(2), which might necessitate financing or require or make desirable the sale or distribution of stocks or other securities at this time, would entail great loss to investors and might not be possible of accomplishment, nor would it be in the interest of investors, consumers or the public.

52. In connection with subsidiary operating public utility companies, their financial condition has been strengthened and improved by reason of their status in the Bond and Share System. Dividend arrearages on the preferred stock accumulated through the depths of the depression have been eliminated in most cases, and are being rapidly made up in others. The values of their securities are appreciating, with resultant appreciation in the value of holding company securities. Further refunding and refinancing projects are under consideration which will further strengthen and improve the condition of respondents and of the operating companies in the System, and whatever action should be taken eventually by the Commission pursuant to Section 11(b)(2) should be deferred until the investors in the securities of said companies may realize the maximum values which their investments might be expected to attain under normal conditions.

53. Pursuant to formal request of the then Chairman of the Commission, dated August 3, 1938, Bond and Share on November 30, 1938 filed with the Commission a document entitled "Integration of Electric Operating Utilities of the Electric Bond and Share Company System" embodying a tentative Plan of Integration of the electric properties in

said system, including as part thereof subsidiary electric companies of American Gas and Electric Company. Said document was re-filed with the Commission on April 3, 1940 in the companion proceeding (File No. 59-3) to this proceeding, and is hereby incorporated herein by reference. On or about November 30, 1938, or shortly thereafter, the respondents hereto American Company, National Company and Electric Company likewise filed with the Commission separate tentative Plans of Integration pursuant to said request of Chairman William O. Douglas, adopting in principle and supplementing the said tentative Plan of Bond and Share. Said documents are likewise by reference made part hereof. Respondents propose further to present and support in this proceeding a report supplementing the said tentative Plans and filings. Respondents state that said tentative Plans as originally filed and as supplemented by said report demonstrate that respondents American Company, Electric Company and National Company, as well as other companies in the system, are essential agencies in accomplishment of any plan of integration of the properties of the operating utilities in the Bond and Share system and to any constructive solution of the problem of integrating and simplifying the corporate structure of the properties in such system, and that any order made at this time in this proceeding looking to the dissolution or termination of the corporate existence of any of the respondents would be destructive of said system and of the systems of respondents, and would prevent the accomplishment of either said tentative Plans of Integration or of any workable and constructive plan for the integration of said public utility properties in the interests of investors and consumers.

Wherefore respondents pray that the Commission withdraw its said notice and order, or enter an order dismissing this proceeding, and/or after due notice and opportunity for

hearing and presentation of evidence, grant such other and further relief in the premises as may be just and proper.

Dated, September 9, 1940.

SIMPSON THACHER & BARTLETT,
by JOHN F. MACLANE,
A member of said firm,
Office and Post Office Address,
No. 120 Broadway, New York, N.Y.

REID & PRIEST,
by FRANK A. REID,
A member of said firm,
Office and Post Office Address,
No. Two Rector Street, New York, N. Y.
Attorneys for Respondents.

[DOCUMENT No. 79.]

Copy Filed 12-6-41 59-12 1st

Simpson Thacher & Bartlett
120 Broadway New York

December 5,1941

Securities and Exchange Commission, 1778 Pennsylvania Avenue, Washington, D. C.

Dear Sirs,

American Power & Light Company has filed with the Commission a motion to consolidate the hearing upon the Plan filed by American Power & Light Company pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935, File No. 54-37, with any further hearings as to American Power & Light Company under the pending Notice and Order under Section 11(b)(2) of said Act, File 59-12.

If counsel for the Commission decides to oppose granting this motion, American Power & Light Company hereby re-

spectfully requests that the Commission order oral argument on said motion and fix a time for filing briefs or memoranda upon said motion.

Very truly yours,

SIMPSON THACHER & BARTLETT,
By JOHN F. MACLANE.

REID & PRIEST,
By FRANK A. REID.

[DOCUMENT No. 80.]

59-12 1st

UNITED STATES OF AMERICA

Before the Securities and Exchange Commission

In the Matter of
American Power & Light Company, Applicant.
File No. 54-37

In the Matter of
Electric Bond and Share Company,
American Power & Light Company,
Pacific Power & Light Company,
Electric Power & Light Corporation,
Utah Power & Light Company,
National Power & Light Company,
Ebasco Services Incorporated,
Respondents.
File No. 59-12

MOTION TO CONSOLIDATE.

December 6, 1941.

The above named American Power & Light Company (hereinafter called "American"), the applicant in the above proceeding File No. 54-37 and one of the respondents in the above entitled proceeding File No. 59-12, moves to consoli-

date the above entitled proceedings in so far as said proceeding File No. 59-12 relates to American and to hold joint hearings in said proceedings and in support of said motion shows:

1. On or about February 28, 1940, a proceeding was instituted by the Commission entitled "In the Matter of Electric Bond and Share Company and its subsidiary companies, respondents, File No. 59-3" by the issue of a "Notice of and Order for hearing pursuant to Section 11(b)(1) of the Public Utility Holding Company Act of 1935". By said notice and order it was charged (Paragraph 136) that the holding company system of Electric Bond and Share Company is not confined in its operations to that of a single integrated public utility system within the meaning of the Act and to such other businesses as are reasonably incidental or economically necessary or appropriate to the operations of such integrated public utility system.

By the allegations of such notice and order and by the terms of the order, the holding company systems of American and the other respondents in said proceeding were brought under review and each of said respondents was permitted to include in its answer its claim as to the action which should be required to be taken by any of them to limit its operations so as to meet the requirements of Section 11(b)(1) of the said Act.

Aside from certain motions and the filing of the answer by respondents (including American) no hearings have been had or further action taken by the Commission under said File No. 59-3.

2. On or about May 9, 1940, the Commission instituted a proceeding against Electric Bond and Share Company and American and other companies in the Electric Bond and Share Company system entitled "In the Matter of Electric Bond and Share Company" et al "File No. 59-12" by "Notice of and Order for hearing pursuant to Section 11

(b)(2) of the Public Utility Holding Company Act of 1935" in which it was charged (Paragraphs 46-47) that "the structure of the holding company system of Electric Bond and Share Company is unduly and unnecessarily complicated", and "voting power is unfairly and inequitably distributed among security holders of said system of said Electric Bond and Share Company".

After certain motions and proceedings not here material, the Commission on June 7, 1940, issued an order limiting the proceeding initially "to the issue of whether it is necessary to discontinue the existence of American Power & Light Company, Electric Power & Light Corporation, National Power & Light Company and American & Foreign Power Company Inc., or any of them, in order to insure that the structure of the holding company system of the Electric Bond and Share Company shall not be unduly or unnecessarily complicated and that voting power shall not be unfairly or inequitably distributed among security holders of such system." By subsequent order dated June 17, 1940, the proceeding was dismissed as to American & Foreign Power Company Inc.

3. Thereafter, commencing on June 18, 1940, and subject to various adjournments, from time to time, hearings have been had before an examiner of the Commission under said notice and order (File No. 59-121) as limited by said order of June 7, 1940, and later order, to the above mentioned issues as stated pertaining to American and other of the respondents, and said hearings are still continuing.

4 Rulings of the Commission with respect to other registered holding companies indicate that American's capitalization must be readjusted in order to comply with Section 11(b)(2) and that American will be required to divest itself of certain of its holdings in order to comply with the provisions of Section 11(b)(1).

5. American has prepared and filed with the Commission

(File No. 54-37) its application under Section 11(e) of the Public Utility Holding Company Act of 1935 for approval of a plan to enable said company to comply with Subsection (b) of Section 11 of said Act. In brief, the Plan proposes, in order to comply with Section 11(b)(2) of the Act, that the corporate structure of American be simplified by the reclassification of its capital stock into a single class of stock with each share having identical rights as to dividends and other distributions and as to voting, and further proposes, in order to comply with Section 11(b)(1) of the Act, that the operations of American be confined to a single integrated public utility system, to be elected by American, with an additional system satisfying the requirements of said Section 11(b)(1). A copy of said Application and Plan is attached hereto as Exhibit A.

6. American believes that it would be in the public interest and in the interest of investors and consumers to consolidate the above entitled proceedings (File No. 54-37 and File No. 59-12) and to continue the present hearings under File No. 59-12 so far as they relate to American in conjunction with the hearings on the Plan proposed by American (File No. 54-37). Such proceedings involve common questions of law and fact and to continue them with joint hearings would be conducive to orderly procedure and economy of effort and expense and would expedite the ultimate disposal of the questions involved in both proceedings.

7. The matter at issue in the proceeding under Section 11(b)(1) of the Public Utility Holding Company Act of 1935 (File No. 59-3) in so far as American is concerned, is the action required to be taken by it to limit its operations so as to meet the requirements of a single integrated public utility system and additional systems imposed by Section 11(b)(1) of the Act. The Plan proposes to meet the objectives and requirements of said Section 11(b)(1) by electing ultimately a single integrated system, and an additional sys-

tem satisfying the requirements of Paragraphs "A", "B" and "C" of said Section 11(b)(1), and by disposing of the other systems not elected to be retained. Effectuation of the Plan will, therefore, dispense with any necessity of independent consideration of or hearing under said File No. 59-3 so far as concerns the American system.

8. The matter presently at issue in the proceeding under Section 11(b)(2) of the Act (File No. 59-12), as limited by the order of the Commission, dated June 7, 1940, as above mentioned, in so far as American is concerned, is whether or not the existence of American should be discontinued to insure that the structure of holding company system of Electric Bond and Share Company shall not be unduly or unnecessarily complicated and the voting power shall not be unfairly or inequitably distributed among security holders of such system. The Plan submitted by American pursuant to Section 11(e) of the Act (File No. 54-37) proposes compliance by American with said Section 11(b)(2) by reclassification of all its capital stock, including all classes of preferred stock and arrearages, and common stock into a single class of stock. The resulting capital structure of American will conform to all standards of the Act and no further question of complex corporate structure or unfair distribution of voting power will remain as to American. The present position of Electric Bond and Share Company as a stockholder of American and the extent of its voting influence in the newly created capital structure will be so altered under the proposed new capital structure as either to solve all questions of corporate simplification and voting control posed by the present notice and order as limited by the said order of June 7, 1940, or such questions will be so clarified as to simplify their solution.

9. Further continuance of the present proceeding File No. 59-12 as at present conducted and upon the issues presently pending without regard to or consideration of the

Plan, can result as to American only in an order dismissing such proceeding or in an order for the dissolution of American. Either order would leave unsolved the problems presented by Section 11(b) of the Act. American as a registered holding company is entitled under Section 11(e) of the Act to present and have considered such a Plan as it has proposed for compliance with Section 11(b). An order of dissolution pending the consideration of the Plan and determination of whether it is fair and equitable would be inconsistent with the Plan and would deny to American and its security holders the rights and protection expressly given them by Section 11(e) of the Act. Such an order would also result in the sacrifice of the interests of the security holders of American by requiring disposal of its holdings under present unsettled world and domestic conditions and the resulting depressed markets.

10. This motion is based upon the statements herein, the Plan and Application for its approval pursuant to Section 11(e) of the Act (File No. 54-37), and upon the record, including pleadings and exhibits, in the 11(b)(1) and 11(b)(2) proceedings File Nos. 59-3, 59-12, and American requests leave to refer to the same in support hereof.

Wherefore American Power & Light Company respectfully requests the Commission to make an appropriate order consolidating the hearing upon the Plan herein described (File No. 54-37) with any further hearings relating to American under the pending notice and order issued under Section 11(b)(2) of the Act (File No. 59-12) and also permitting counsel for the Commission and counsel for American, upon motion, to incorporate by reference as a part of the proceeding as to the Plan (File No. 54-37) any specified portions of the testimony and exhibits heretofore introduced in the aforesaid proceeding (File No. 59-12) which are relevant to the said hearing upon the Plan so that the same may

constitute a part of the record upon which the Commission shall base any order or orders relating to the Plan.

Respectfully submitted,

SIMPSON THACHER & BARTLETT,
by JOHN F. MACLANE

REID & PRIEST,
by FRANK A. REID.

Dated, December 6, 1941.

CLERK'S COPY.

Vol. II

TRANSCRIPT OF RECORD

(Pages 393 to 680)

Supreme Court of the United States

OCTOBER TERM, 1945

No. 6

AMERICAN POWER & LIGHT COMPANY,
PETITIONER,

vs.

SECURITIES AND EXCHANGE COMMISSION

No. 7

ELECTRIC POWER & LIGHT CORPORATION,
PETITIONER,

vs.

SECURITIES AND EXCHANGE COMMISSION

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONS FOR CERTIORARI FILED JUNE 16, 1944.

CERTIORARI GRANTED MAY 28, 1945.

VOLUME II.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1942.

No. 3823.

AMERICAN POWER & LIGHT COMPANY,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

No. 3824.

ELECTRIC POWER & LIGHT CORPORATION *v.* SAME.

PETITIONS FOR REVIEW OF ORDERS OF THE SECURITIES AND EXCHANGE COMMISSION.

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Pages 393 to 680, inclusive.

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ARTHUR A. BALLENTINE,
for AMERICAN POWER & LIGHT CO., *Petitioner.*

BOYKIN C. WRIGHT,
WALLACE P. ZACHRY,
R. GRAHAM HEINER,
DANIEL JAMES,
JOHN F. MacLANE,
WRIGHT, GORDON, ZACHRY, PARLIN & CAHILL,
for ELECTRIC POWER & LIGHT CORPORATION, *Petitioner.*

JOHN F. DAVIS,
for SECURITIES AND EXCHANGE COMMISSION, *Respondent.*

BOSTON:
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EXHIBITS.

EXHIBIT A.

UNITED STATES OF AMERICA

Before the Securities and Exchange Commission

In the Matter of

American Power & Light Company, *Applicant.*

File No.

APPLICATION UNDER SECTION 11(e) OF PUBLIC UTILITY HOLDING COMPANY ACT OF 1935 BY AMERICAN POWER & LIGHT COMPANY FOR APPROVAL OF PLAN TO ENABLE SAID COMPANY TO COMPLY WITH SUBSECTION (b) OF SECTION 11 OF SAID ACT.

1. The Applicant, the above named American Power & Light Company (American Company), a "registered holding company" under the Public Utility Holding Company Act of 1935 (hereinafter called the "Act"), files herewith, marked Exhibit 1, a plan on behalf of said Company, under Section 11(e) of said Act for divestment of control, securities, or other assets, and for other action by said company to enable said company to comply with subsection (b) of Section 11 of said Act and respectfully requests consideration and approval of said plan by the Securities and Exchange Commission (hereinafter called the "Commission").

2. The Applicant has caused said plan to be prepared, submitted to and approved by its Board of Directors subject to the approval of the Commission and of its stockholders and the filing of the said plan under this application has been authorized and directed by the Board of Directors of the Applicant.

3. Electric Bond and Share Company (Bond and Share) is the "top holding company" in a public utility holding company system under said Act in which the Applicant, Electric Power & Light Corporation (Electric Company) and National Power & Light Company (National Company) are "intermediate holding companies," each having public utility subsidiaries in various states of the United States.

4. On or about February 28, 1940, a proceeding was instituted by this Commission entitled "In the Matter of Electric Bond and Share Company and its subsidiary companies, respondents, File No. 59-3" by the issue of a "Notice of and Order for hearing pursuant to Section 11 (b) (1) of the Public Utility Holding Company Act of 1935." By said notice and order it was charged (paragraph 136) that the holding company system of said Bond and Share is not confined in its operations to that of a single integrated public utility system within the meaning of the Act and to such other businesses as are reasonably incidental or economically necessary or appropriate to the operations of such integrated public utility system.

By the allegations of such notice and order and by the terms of the order, the holding company systems of the Applicant and the other respondents in said proceeding were brought under review and each of said respondents were permitted to include in their answers their claims as to the action which should be required to be taken by any of them to limit their operations so as to meet the requirements of Section 11(b)(1) of the said Act.

Aside from certain motions and the filing of the answer by respondents thereto (including the Applicant) no hearings have been had or further action taken by the Commission under said File No. 59-3.

5. On or about May 9, 1940, the Commission instituted a proceeding against the Applicant herein and other companies in the Bond and Share system entitled "In the Mat-

ter of Electric Bond and Share Company" et al "File No. 59-12" by "Notice of and Order for hearing pursuant to Section 11(b)(2) of the Public Utility Holding Company Act of 1935" in which it was charged (paragraphs 46-47) that "the structure of the holding company system of Electric Bond and Share Company is unduly and unnecessarily complicated", and "voting power is unfairly and inequitably distributed among security holders of said system of said Electric Bond and Share Company".

After certain motions and proceedings not here material, the Commission on June 7, 1940, issued an order limiting the proceedings initially "to the issue of whether it is necessary to discontinue the existence of American Power & Light Company, Electric Power & Light Corporation, National Power & Light Company and American & Foreign Power Company Inc., or any of them, in order to insure that the structure of the holding company system of the Electric Bond and Share Company shall not be unduly or unnecessarily complicated and that voting power shall not be unfairly or inequitably distributed among security holders of such system". By subsequent order dated June 17, 1940, the proceeding was dismissed as to American & Foreign Power Company Inc.

6. Thereafter commencing on June 18, 1940, and subject to various adjournments, from time to time, hearings have been had before an examiner of the Commission under said notice and order (File No. 59-12) as limited by said order of June 7, 1940, and later order, to the above mentioned issues as stated pertaining to the Applicant and to Electric and National Company, and said hearings are still continuing. However the issues in the pending proceedings may be decided, it would doubtless be or become necessary for either the Commission or the Applicant to formulate and present some plan for compliance by the Applicant under Section 11(b) of the Act.

7. In view of the foregoing, but without prejudice to legal and constitutional rights as hereinafter stated, the Applicant has prepared and files herewith the plan above mentioned and presents it herewith for consideration and approval.

8. The plan proposes, in brief:

The present stock capitalization of the Applicant shall be revised to consist of a single class of common stock. This stock shall be issued to present Preferred Stockholders ($6) and to present $5 Preferred Stockholders on the basis of one share of new common stock (or a convenient multiple or fraction of such share) for each presently outstanding share of said Preferred Stocks, and an additional share of new common stock (or a convenient multiple or fraction thereof) for each $100 of arrearages on said present Preferred Stocks, calculated to the effective date of the plan. Whether any differential shall be allowed in favor of the Preferred Stock ($6) over the $5 Preferred Stock, in addition to the greater number of shares resulting from larger dividend arrearages, is left for determination pursuant to this application. The present Common Stock is to be awarded such participation in the new common stock as may be determined to be fair and equitable. The exact amount of differential, if any, to be awarded the Preferred Stock ($6) over the $5 Preferred Stock and the amount of participation to be awarded the Common Stock will be determined as work on the plan progresses.

The funded debt of the Applicant is to be discharged or otherwise provided for from available cash on hand and the sale or exchange of securities in the Applicant's portfolio.

Upon the completion of the recapitalization and dis-

charge or provision for the funded debt, the Applicant will select and retain, subject to the approval of this Commission, from its present systems such "integrated public-utility system", or systems, as it may be entitled to retain under the Public Utility Holding Company Act of 1935 and will distribute the stocks of the remaining subsidiaries to the holders of the new common stock in proportion to their respective holdings, either directly or through the creation of such new companies, or combinations of existing companies, as may be determined to be desirable and practicable. As a result the present stockholders will have certificates for shares or fractional shares of stock in the recapitalized Applicant and in the other companies, not sold or exchanged, proportionate to their present holdings as reflected in the reclassified common stock of the Applicant.

The right is reserved to propose complete liquidation of American Company by amendment to the plan.

The plan is not to become effective except upon approval of this Commission and the vote of 90% of the Applicant's Preferred Stock ($6), of 90% of its $5 Preferred Stock and of a majority of its Common Stock.

The Applicant is distributing to its stockholders a letter with reference to the plan and the filing of the plan with this Commission, a copy of which letter is filed herewith marked Exhibit 2.

9. There are no applicable provisions of the charter, by-laws or similar documents of American Company relating to the right of the person signing and filing this application to take such action on behalf of said Company. Such authorizations are dependent on resolutions of the Board of Directors of American Company adopted at a meeting of

said Board of Directors held on July 23, 1941, a copy of which is attached hereto as Exhibit 3.

10. The Company hereby requests that the original, a duplicate original, or a photo copy of this application and any and all amendments thereto, whether executed hereafter or concurrently herewith, be offered in evidence on behalf of said Company and be received in evidence as an exhibit of said Company in any proceeding before the Commission, or any officer thereof or any Trial Examiner designated thereby, and that the verification of such application and any amendment thereto be considered as if the persons signing such verification had personally appeared and testified orally, under oath, duly administered, in any such proceeding to the statements contained in such verification.

11. The Company hereby agrees that whenever any document constituting part of the official files of the Commission is offered or received in evidence, it is offered or received subject to the reservation that if at any future time a transcript of the record is called for, either in connection with a petition for review or otherwise, copies may be furnished in lieu of the originals.

12. Neither this application nor the plan filed herewith nor the acceptance of or reliance upon any order, rule or regulation, or of any order or direction of the Commission, shall be deemed to be a waiver of constitutional or legal rights of the Company or any of its associate or affiliate companies, all of which are hereby expressly reserved. The Company also expressly reserves and refuses to waive any constitutional rights and expressly reserves the right to contest the constitutionality of any provision of the Act as applied to it, or of any rule, regulation or order now or hereafter made or purported to be made thereunder and specifically reserves various constitutional and legal rights and questions reserved in its motions, answers and proceed-

ings filed and taken in connection with the said notice and orders of the Commission above mentioned under Sections 11(b)(1) and 11(b)(2) of the Act hereinbefore mentioned and designated as File Nos. 59-3 and 59-12, respectively. If this reservation and refusal to waive any constitutional or legal right shall be held invalid or inoperative by any court of competent jurisdiction, this application shall be deemed to have been void and of no effect from any date specified in written notice given to the Commission by or on behalf of the Company.

Pursuant to the requirements of the Public Utility Holding Company Act of 1935, the Company set forth below caused this instrument to be duly executed on its behalf by its authorized officers on this the 23rd day of July, 1941.

AMERICAN POWER & LIGHT COMPANY
By Howard L. Aller President

ATTEST:
D. W. Jack Secretary
(Seal)

SIMPSON THACHER & BARTLETT
By John F. MacLane A member of said firm, 120 Broadway, New York City

REID & PRIEST
By Frank A. Reid A member of said firm, 2 Rector Street, New York City
Counsel.

State of New York }
County of New York } ss.

The undersigned being duly sworn deposes and says that he has duly executed the attached instrument for and on behalf of the Company named herein; that he is the President of such Company; and that all action by stockholders, directors and other bodies necessary to authorize deponent

to execute and file such instrument has been taken. Deponent further says that he is familiar with such instrument and the transactions referred to therein, and that to the best of his knowledge, information and belief the statements made in such instrument are true.

HOWARD L. ALLER

Subscribed and sworn to before me at New York, N. Y., this 23rd day of July, 1941.

(Seal) Florence O. Demo

EXHIBIT 1.

PLAN PROPOSED BY AMERICAN POWER & LIGHT COMPANY PURSUANT TO SECTION 11 (e) OF THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935

SUMMARY

(1) The Plan proposes compliance by American Power & Light Company (American Company) with both Sections 11(b)(1) and 11(b)(2) of the Public Utility Holding Company Act of 1935.

(2) The stock capital of American Company shall be reclassified into a single class of stock based upon the outstanding Preferred Stock and arrearages, calculated to the effective date of the Plan, computed at a value of one share of present Preferred for each $100 of arrearages, additional units being provided for satisfaction of any differential in claims between the $6 and $5 Preferred Stock, and such allowance as may be determined to be equitable for Common Stock participation.

(3) American Company will use available cash and other assets as may be required to discharge its debt obligations.

(4) The present system of American Company comprises six integrated public utility systems consisting of the Northwestern group, the Texas group, the Kansas-

Nebraska group, the Minnesota-Superior group, Florida Power & Light Company and Central Arizona Light and Power Company. American Company claims the right to elect any two of these groups as the integrated systems which it is permitted to retain under the Public Utility Holding Company Act.

(5) A "Northwestern holding company" shall be created or selected which shall acquire American Company's holdings in The Montana Power Company, The Washington Water Power Company, Pacific Power & Light Company, Northwestern Electric Company and Portland Gas & Coke Company, except such thereof as may be sold to public bodies, unless control of these companies is retained by American Company.

(6) A "Texas company" shall be created or selected which shall acquire American Company's holdings in, or the properties of, Texas Power & Light Company, Texas Electric Service Company, Texas Public Utilities Corporation and New Mexico Electric Service Company, unless control of these companies is retained by American Company.

(7) A "Kansas-Nebraska company" shall be created or selected which shall acquire American Company's holdings in, or the properties of, Nebraska Power Company and Kansas Gas and Electric Company, unless control of these companies is retained by American Company.

(8) Minnesota Power & Light Company shall acquire the stock of Northern Power Company and Superior Water, Light and Power Company (which shall first be merged into a single company), operating all of these properties as an integrated system in northern Minnesota and Wisconsin, and shall also acquire the stock and obligations of Topeka Land Company, unless control of these companies is retained by American Company.

(9) The remaining companies of the system will maintain their present corporate organization and operating status.

(10) There is reserved for later consideration the possible acquisition and inclusion within the systems referred to in the next preceding paragraphs (5) to (9) inclusive of additional properties which may be properly integrated with the properties in such groups in compliance with the Public Utility Holding Company Act of 1935 and the right is reserved to distribute directly the stocks of any existing subsidiaries which are not retained by American Company in lieu of selecting or creating the systems referred to in said paragraphs.

(11) Subject to sales or exchanges of properties in satisfaction of debt or for outstanding Preferred Stock, there shall be distributed to the stockholders of American Company shares or fractional shares of the reorganized American Company, which will continue to own the stocks of the companies in the systems which it is permitted, and elects, to retain, and shares or fractional shares of each of the remaining companies in the present system (or the company or companies created or selected to hold any of such stocks or to own the properties of any of such companies) in proportion to their reclassified stock units in the reorganized American Company, with the result that American Company will remain a holding company with a single class of stock only as to the companies which it is permitted to retain in its holding company system, and the remaining companies will be divorced from the American Company system and the stocks will pass into the direct ownership of American Company's present stockholders, subject to the effect of the reclassification of shares. Right is reserved to propose by amendment complete liquidation of American Company.

(12) The number of shares of common stock of newly created companies or existing subsidiaries shall be stated or restated into such number of shares as may avoid excessive transfer taxes and permit convenient distribution to holders of the reclassified American Company stock.

(13) Right is reserved to submit proposal for reclassification of American Company stock to stockholders prior to submission of other parts of the Plan, if the Securities and Exchange Commission approves such reclassification and reserves decision on other parts of the Plan.

(14) The Plan is subject to the approval of the Commission and of a stock vote of 90% of the $6 Preferred Stock, of 90% of the $5 Preferred Stock and of a majority of Common Stock of American Company.

American Power & Light Company

Plan for Divestment of Control of Securities, Limitation of Operations and Other Action to Comply with the Provisions of Subsection (b) of Section 11 of the Public Utility Holding Company Act of 1935.

I.

Scope and Authorization of Plan

1. The purpose of this Plan is to offer compliance with Section 11(b) of the Public Utility Holding Company Act of 1935. This section contains two subdivisions designated (b) (1) and (b) (2), which may be referred to herein as the "Integration" and "Simplification" provisions, respectively. These subsections are quoted in the margin,[1] as

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[1] "(b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

(1) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system: Provided, however, that the Commission shall permit a registered holding company to continue to control one or more additional integrated public-utility systems, if, after notice and opportunity for hearing, it finds that —

is also the definition of "Integrated Public Utility System" contained in Section 2(a) (29) of the Act.[2]

(A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;

(B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country; and

(C) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation.

The Commission may permit as reasonably incidental, or economically necessary or appropriate to the operations of one or more integrated public-utility systems the retention of an interest in any business (other than the business of a public-utility company as such) which the Commission shall find necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems.

(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company.''

[2] ''(29) 'Integrated public-utility system' means—

(A) As applied to electric utility companies, a system consisting of one or more units of generating plants and/or transmission lines and/or distributing facilities, whose utility assets, whether owned by one or more electric utility companies, are physically interconnected or capable of physical interconnection and which under nor-

2. The Plan has been prepared by executives of the American Power & Light Company with the assistance and advice of Counsel, and submitted to, and considered and approved by the Board of Directors, who have authorized and directed it to be submitted to the Securities and Exchange Commission in accordance with Section 11(e) of the Act.[3]

3. If approved by the Securities and Exchange Commission, either as presented or with such modifications as the Board of Directors may accept, the Plan shall be submitted to the stockholders of American Power & Light Company, and of any subsidiary whose organization may be so affected by the Plan as to require approval of stockholders, and the Plan shall not become effective until approved by such vote of stockholders as may be required by law, charter or by-law, or confirmed by such court action as may be appropriate and necessary under the Public Utility Holding Company Act, or otherwise required by law. In so far as said Plan may require the consent or approval of the Public Utilities Commission or similar regulatory body of any State or the Federal Power Commission or other federal

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mal conditions may be economically operated as a single interconnected and coordinated system, confined in its operations to a single area or region, in one or more States, not so large as to impair (considering the state of the art and the area or region affected) the advantages of localized management, efficient operations, and the effectiveness of regulation; * * *"

[3] "Any registered holding company * * * may * * * submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan."

or state governmental agency, such part of the Plan as may require such consent or approval shall not become effective until the required consent or approval shall be obtained or until any other specific legal requirements shall be satisfied.

4. Submission of this Plan is subject to reservation of all constitutional and legal rights of American Power & Light Company and its security holders, and of any subsidiary affected thereby and its security holders.

II.

Corporate and Capital Structure of American Power & Light Company

5. American Power & Light Company (hereinafter called "American Company") is a corporation organized under the laws of the State of Maine. It is a registered holding company within the meaning of the Public Utility Holding Company Act of 1935 (hereinafter called the "Act"), and is a subsidiary of Electric Bond and Share Company (hereinafter called "Bond and Share"), which is likewise a registered holding company.

6. The capitalization of American Company is as follows:

Type of Security	Amount Outstanding	Principal Amount Par or Stated Value
Funded Debt....	$46,261,000.00	$46,261,000.00
Preferred Stock ($6), Cumulative, No Par	793,581.2 shares*	79,300,926.00
$5 Preferred Stock, Cumulative, No Par.....	978,444 shares	97,844,400.00
Common Stock No Par.....	3,008,511.54 shares**	37,434,351.29

* Including scrip equivalent to 26.2 shares.

** Excluding 5,301 shares reacquired, and including scrip equivalent to 2,013.54 shares.

7. Each share of stock (excluding scrip) of each of the above classes is entitled to one vote with respect to ordinary business of the corporation. The Preferred Stock ($6) and the $5 Preferred Stock rank *pari passu* as to dividends and in liquidation, and have a preference in liquidation over the Common Stock of $100 per share plus unpaid cumulative dividends. As of December 31, 1940 unpaid cumulative dividends in arrears on the two classes of preferred stock totaled approximately $32,701,400, representing more than 3 years' requirements on each class. No dividends have been paid on the Common Stock since June 1, 1932.

8. Bond and Share owns 51,840 shares of said $5 Preferred Stock, being 5.30% of the total amount of $5 Preferred Stock outstanding, and 937,221 shares of Common Stock, being approximately 31% of the total amount of Common Stock outstanding.

9. The following are subsidiary companies of said American Company and are public utility companies within the meaning of the Act.

Name	State of Organization	State in which Company Operates	Nature of Business
Central Arizona Light and Power Company	Arizona	Arizona	Electric and Gas
Florida Power & Light Company	Florida	Florida	Electric and Gas
Kansas Gas and Electric Company	West Virginia	Kansas and Missouri	Electric
Minnesota Power & Light Company	Minnesota	Minnesota	Electric and Steam Heating
The Montana Power Company	New Jersey	Montana and Idaho	Electric, Gas, Steam Heating and Water
Nebraska Power Company	Maine	Nebraska and Iowa	Electric
New Mexico Electric Service Company	New Mexico	New Mexico	Electric
Northern Power Company	Wisconsin	Wisconsin	Electric
Northwestern Electric Company	Washington	Oregon and Washington	Electric and Steam Heating

Name	State of Organization	State in which Company Operates	Nature of Business
Pacific Power & Light Company	Maine	Washington and Oregon	Registered holding company, Electric, Steam Heating and Water
*Inland Power & Light Company	Oregon	Washington	Electric
Portland Gas & Coke Company	Oregon	Oregon and Washington	Gas
Superior Water, Light and Power Company	Wisconsin	Wisconsin	Electric, Gas and Water
Texas Electric Service Company	Texas	Texas	Electric
Texas Power & Light Company	Texas	Texas	Electric
Texas Public Utilities Corporation	Texas	Texas	Electric, Ice and Water
The Washington Water Power Company	Washington	Washington and Idaho	Electric, Water and Steam Heating

* Inland Power & Light Company is a wholly owned subsidiary company of Pacific Power & Light Company.

10. The following are subsidiary companies of said American Company and are not public utility companies within the meaning of the Act, but are engaged in the business respectively set forth opposite their names:

Name	State of Organization	Nature of Business
Consumers Water Company	Florida	Water
Glacier Production Company	New Jersey	Natural gas production and transmission; production and sale of crude oil, gasoline and butane, refinery operation
Big Bend Transit Company	Washington	Inactive (real estate)
Inland Empire Refineries, Inc.	Nevada	Oil Refining

Moen-Leick Industries, Inc.	Washington	Distribution of gasoline and other petroleum products
Chief Petroleum Company, Inc.	Washington	Distribution of gasoline and other petroleum products

Name	State of Organization	Nature of Business
Great Falls Townsite Company	Montana	Hotel and real estate
Yakima Credit Corporation	Washington	Financing fruit marketing
Pike Rapids Power Company (The)	Minnesota	Inactive
R. S. & C. Irrigation Company, Inc.	Washington	Irrigation
Topeka Land Company	Minnesota	Inactive (real estate)
Utilities Land Company	Florida	Real estate
Columbia Highlands Company	Washington	Inactive (real estate)
Limestone Company (The)	Washington	Inactive (undeveloped limestone properties in Idaho)
Chelan Valley Credit Corporation	Washington	Financing fruit growers
Okanogan-Douglas Credit Corporation	Washington	Financing fruit growers
Omak Credit Corporation	Washington	Financing fruit growers
Spokane United Railways	Washington	Transportation
Washington Irrigation & Development Company	Washington	Inactive (real estate)

With the exception of Glacier Production Company which operates in Montana, and Inland Empire Refineries, Inc. which operates in Washington and Montana, each of said companies does business in the above described state of organization.

11. American Company owns all or substantially all of the common stocks, and in some cases some preferred stocks, bonds, debentures, notes and other obligations of its above named public utility subsidiaries. The stocks, and in some cases other securities, of the above named non-utility subsidiaries are owned either directly by American Company or by subsidiaries. The bonds and preferred stocks of the principal public utility subsidiaries of American Company are widely held by large numbers of investors. Except for the holdings of Bond and Share above noted, the funded debt, preferred stock and common stock of American Company are likewise widely held by large numbers of investors.

12. There are attached hereto the following schedules, all as of December 31, 1940:

Schedule I—Schedule of Principal Investments of American Company in Subsidiaries.

Schedule II—Schedule of Mortgage Bonds and Debentures Held by Public in Subsidiaries of American Company.

Schedule III—Schedule of Preferred Stocks Held by Public in Subsidiaries of American Company.

Schedule IV—Balance Sheet of American Company.

Schedule V—Consolidated Balance Sheet of American Company and Subsidiaries.

Schedule VI—Statement of Income and Earned Surplus of American Company.

Schedule VII—Statement of Consolidated Income of American Company and Subsidiaries.

Schedule VIII—Common Stock Capitalization and Earnings of Principal Subsidiaries.

Schedule IX—Summary of Plant Account and Capitalization of Public Utility Subsidiaries.

Schedule X—Income of American Company from Pre-

ferred Dividends and Interest, Years 1939 and 1940.

Schedule XI—Yearly Income from Preferred Dividends and Interest on Basis of Holdings December 31, 1940.

III.

Description of Business and Properties

13. Since its incorporation in 1909 American Company has confined its operations to the public utility holding company field as a vehicle for organizing, financing and developing electric, and in some cases gas, public utilities and related businesses. A fundamental concept of its organization was to diversify its holdings in public utilities so as to distribute the risk of the equity capital over as wide a territory as possible. With this object consciously in view, it created or acquired the public utility companies described in the preceding section in states as widely separated as Oregon and Washington in the northwest, Florida in the southeast, Minnesota in the north and Texas in the south, with other companies in central and western states, as above described.

14. Commencing with a limited capital and small properties in Kansas, Oregon and Washington, with total plant accounts in 1910 of some $24,000,000 and total operating revenues of some $2,500,000, American Company has grown and extended its operations over the wide field above mentioned to the point where its consolidated plant account as of December 31, 1940, was $765,907,505, and consolidated operating revenues of subsidiaries for the year ending December 31, 1940 were $108,221,998. It has at all times met all maturities and paid all interest upon its funded and other debt, and until and including October 1, 1932 had paid every quarter full dividends on its preferred stock, and in every year from 1913 to 1932 paid a cash dividend, and in

some years stock dividends, upon its common stock. Following the year 1932, however, due first to the influence of the depression, and in recent years to greatly increased taxes and other operating expenses, reduced rates, and the influence of government competition, it has met only a part of its preferred dividend requirements, and has paid no common dividends, maintaining, however, a consistent record of meeting all debt obligations, and paying through most of the period substantial dividends on its preferred stock. By December 31, 1940, it had undeclared cumulative dividends on its $6 Preferred Stock aggregating $20.32½ a share, or $16,129,005.38, and on its $5 Preferred Stock, $16.93¾ per share, or $16,572,395.25.

15. Notwithstanding the relatively unfavorable operating results of recent years, the Company and its principal operating subsidiaries have consistently maintained sound financial position and efficient operating properties, responding to every demand for service, and not only maintaining their properties in prime operating condition, but expanding and adding to them as service demands required. Between 1933 and 1940, inclusive, American Company's utility subsidiaries increased their plant account by $48,314,952 and reduced their debt by $9,910,368.

Consolidated current and accrued assets as of December 31, 1940, aggregated $60,066,610.96, as against current and accrued liabilities of $30,213,998.81. Of current assets approximately $40,000,000 represented cash or cash items (chiefly United States Government, state and municipal obligations). American Company itself had as of December 31, 1940, current assets of $20,326,105.58 against current liabilities of $4,684,509.47, and of its current assets cash or cash items aggregated approximately $20,000,000. Consolidated earned surplus of all companies as of December 31, 1940, was $45,137,007.50, of which American Company's earned surplus was $10,301,573.43

16. American Company's principal investments are in the common stocks of its subsidiary public utilities, but it has some investments in non-utility subsidiaries, and has substantial investments in debentures, bonds, notes, other obligations and preferred stocks of utility subsidiaries.

The following table indicates the combined earnings of American Company's subsidiaries applicable to American Company and other income of American Company for 1939 and 1940:

Table 1—Earnings Applicable to American Company.

	1939	1940
Net income of subsidiaries applicable to their common stocks owned by American Company (Schedule VIII)	$11,403,126	$12,420,484
American Company's income from interest and preferred dividends, and from short-term investments (Schedule X)*	3,058,317	2,846,817
Total	$14,461,443	$15,267,301

* Adjusted to include dividends on the preferred stocks of Florida Power & Light Company and Minnesota Power & Light Company at the regular annual rates. Actual amounts declared were at varying rates in 1939 and 1940.

Interest on American Company's funded debt for the year 1939 was $2,836,168 and for the year 1940 was $2,775,821.

These earnings are believed not to be fairly representative of the future earning power of American Company's investments. Present uncertainties due not only to the world situation but to the continued influence of increasing taxes, other operating expenses, government competition, and the readjustment of financial structure contemplated in

the Plan render earnings predictions based merely on current results unreliable.

17. In any reorganization of capital structure, consideration should be given to the intrinsic values of the company's holdings. The properties of operating subsidiaries have present values greatly in excess of their original costs, which indicate substantial equity values for the common stocks of these companies which comprise American's principal investment. These companies were well conceived and constructed and are performing necessary and valuable public service. An engineering estimate of present value of the principal operating subsidiaries of American Company, on the basis of cost of reproduction less depreciation, indicates a value, applicable to American Company's holdings of debt and stocks in such companies calculated on said basis, in excess of $300,000,000, as against American's investment account as of December 31, 1940, of $252,262,215.73. These companies are entitled to earn a reasonable return upon their fair values and, to the extent that such values are found to be greater than heretofo e, should be entitled to earnings predicated upon such present values.

18. Reviewing the entire situation, it may be said that American Company and its subsidiaries embody an inherently sound public utility holding company system founded on operating subsidiaries with substantial physical values and earning power. Under normal conditions, and freed from the continued threat of governmental competition, this system would yield full earnings requirements on American Company's preferred stock, including arrearages capitalized *pari passu* with the preferred stock, and leave substantial equity for the common stockholders.

19. Notwithstanding these facts, the incidence of the Public Utility Holding Company Act, the accumulated and accumulating arrearages on the preferred stock, and the continuance of the adverse factors above mentioned, make

it advisable to subsmit a plan of reorganization readjusting capital structure and limiting the operations of American Company.

IV.

Outline of Plan

20. Reference to the text of Section 11(b)(1) and (2) of the Public Utility Holding Company Act, as quoted in the marginal notes *supra*, correlated to the facts above recited as to physical operations of subsidiaries and capital structure of American Company, will indicate that in order to comply with this section of the Act, American Company must confine its control of public utility subsidiaries and the consequent field of its operations to a group of companies which may be held to constitute a single integrated public utility system, with such additional systems as the Securities and Exchange Commission may permit it to retain under Subparagraphs (A), (B) and (C) of Section 11(b)(1), and will indicate further that the corporate structure of the system must be free from unnecessary complications and be such as to fairly and equitably distribute voting power among security holders of the system.

21. It is not the purpose here to raise any technical or disputed questions as to the legal interpretation of these statutory provisions. They have not yet been authoritatively construed by the courts, and the Commission itself has not definitely exhausted the field of interpretation. The Commission has instituted against American Company proceedings under both Sections 11(b) (1) and (b) (2), upon charges that the present system violates these requirements of the Act. Without weighing these charges, it is obvious that American Company will be required to readjust its capital structure, and divest itself of control of a number of its important subsidiaries.

22. Consequently, the Plan herein proposed contemplates

that American Company shall reclassify its existing preferred stock, including arrearages, and common stock into a single class of stock which may be allocated on an equitable basis to each class of stock; that provision be made to take care of its present funded debt; that it shall limit the operations of its holding company systems to such subsidiaries comprising "single integrated public utility system(s)" and incidental businesses as the Company may be permitted to retain under the statute; and that it shall dispose of its holdings in the securities of other subsidiaries by ratable distribution to the holders of the reclassified stock.

23. The result of such a Plan will be that American Company will continue to be a holding company, with a much simpler and reduced capital structure with respect to the holding company system or systems that it may retain, and that the security holders of American Company will continue to own, subject to the effect of the reclassification of stock, their proportionate interest in all the holdings of the Company except such as may be required for other purposes stated in paragraphs 31 and 32 of Section VI hereof. Thus a present stockholder of American Company, instead of having certificates of stock in American Company alone, will have certificates for shares or fractional shares of stock in the reorganized American Company, and also in each of the subsidiary companies whose stock is distributed to him, proportionate to his holdings in American Company, as reflected in the reclassified stock.

24. This Plan is set forth in detail in the following articles, considering first, the reorganization of capitalization and financial structure, and second the determination of "integrated public utility systems" and their disposition.

V

Preliminary Readjustment of American Company Stock Capital

25. The major problem in the distribution of the holdings of American Company in the consummation of the Plan is to reclassify existing preferred (including arrearages), and common stock into units expressive of a common denominator for all classes of stock.[4]

26. American Company's present stock capitalization as of December 31, 1940, including each $100.00 of arrearages on the $6 Preferred and $5 Preferred stocks as equivalent to one share of stock on which such arrearages have accumulated, is as follows:

Table 2.

Class of Stock	Shares or Equivalent (Omitting Fractions)
$6 Preferred Stock	793,581 shares
Arrearages	161,290 " equivalent
$5 Preferred Stock	978,444 "
Arrearages	165,723 " "
Total Preferred Stock	2,099,038 " "
Common Stock	3,008,511 "

The stated value of $6 Preferred Stock and $5 Preferred Stock is $177,145,326 (arrearages on said preferred stocks as of December 31, 1940 totaled $32,701,400.63). The stated value of Common Stock is $37,434,351.29.

[4] In order to avoid frequent transfers with attendant expense, including taxes, it is proposed that each certificate of stock outstanding, irrespective of class, shall automatically become in legal effect a right to receive from time to time, as issued for delivery, the various stocks of the reorganized American Company and of the present subsidiaries to be distributed in the consummation of the Plan, to which the shares represented by such certificate shall be entitled.

27. It is proposed that the stock capital of the present American Company be reclassified in effect into such number of units as may be found advisable, after considering the equities of all classes of stock and the values attributable thereto, and that these units shall have the right to receive (1) new stock of the American Company and (2) stock of such of the present subsidiaries as shall be distributed to stockholders.

28. No attempt is made here to suggest the differential which might properly be recognized between the $6 Preferred Stock and the $5 Preferred Stock in the number of shares to be distributed in the reorganized American Company, or the number of units which might properly be awarded the present common shares. The $6 Preferred and $5 Preferred would be entitled to the number of units, or such fraction or multiple of such number, as may be adopted as the basis of distribution, including in such units arrearages on both classes of Preferred Stock to such date as may be fixed under the Plan. Additional units would be provided for any differential which might be accorded the $6 Preferred over the $5 Preferred, and the satisfaction of claims of the Common Stock to recognition. These problems are left open for determination upon consideration of all equities and pertinent facts.[5] To facilitate distribution of new stock of the reorganized American Company and the stocks of subsidiaries, the total unit capitalization should be in round figures, any odd number of units to be

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[5] On a liquidation of the present American Company, both $6 and $5 Preferred Stocks would be entitled (after present arrearages are satisfied), to share *pari passu* in distribution of cash or securities. Since it is proposed to continue the corporate existence of American Company, there may be a basis for preservation of some differential between these two classes of stock which should be compensated by some additional allotment of the new shares to the $6 Preferred as a class. The Common Stock is entitled to values inherent in the properties in excess of claims of prior securities.

retained in the treasury of the reorganized American Company or sold.

VI.

Capitalization and Functions of Reorganized American Company

29. It is proposed that the present American Company shall be continued in its corporate existence with its present charter and with its present powers, and will continue, pending the consummation of the Plan, to own the common stocks and other securities presently held by American Company, will retain all present investments, cash, and other current assets of American Company, and will continue to be obligated with respect to all current liabilities. In addition to current liabilities it will have outstanding American Company's direct obligation debentures aggregating $42,358,000, and Southwestern Power & Light Company assumed debentures aggregating $3,903,000, and will issue shares of common stock in such number and of such par value as may be determined. It is proposed that corporate accounts, both asset and liability, may be so stated that the book value of securities distributed to stockholders or otherwise disposed of may be charged to capital surplus or reserves created therefor.

30. Upon the completion of the recapitalization of American Company, as herein provided, each present stockholder of American Company shall have the right to receive shares (or fractional shares) of stock of the reorganized American Company for each unit, as hereinbefore defined, of the stock of American Company held by him.

31. The first duty of the reorganized American Company will be to discharge or otherwise provide for the present American Company's direct obligation debentures and the Southwestern Power & Light Company debentures assumed by American Company. It is proposed that Ameri-

can Company's cash and other assets as may be required, shall be used to discharge these American direct obligation debentures. The assumption of the Southwestern Power & Light Company debentures by the reorganized American Company may continue at least until 1947, and assets sufficient for their security and ultimate retirement may be retained by American Company.

32. American Company reserves the right, pending consummation of the Plan, to sell any securities of any subsidiary presently held by it, or to effect any exchange of any such securities for present debentures or present preferred stock, on bases which may meet the approval of the Securities and Exchange Commission.

33. The reorganized American Company will elect the integrated system or systems which it will be entitled to retain from the present holdings of American Company on principles hereinafter stated, and shall retain the securities representing its interests in such integrated syste.. or systems. The stocks of the remaining subsidiaries not included within any of said retained systems, or not required for the purposes stated in paragraphs 31 and 32, will be distributed to the common stockholders of the reorganized American Company in proportion to their respective holdings.

VII.

The Selection of an Integrated Public Utility System or Systems

34. Prior to the distribution of the stocks of subsidiaries not to be retained in the integrated public utility system or systems of American Company, the Company shall elect the integrated system or systems which it is entitled to retain and shall present its election to the Commission for its consideration and approval. The principles governing such election are set forth in 11(b) (1) of the Act, as quoted in

the margin on page 2 hereof. Briefly, under such section the company may retain, subject to the approval of said Commission, "a single integrated public utility system and * * such other businesses as are reasonably, incidental or economically necessary or appropriate to the operations" of such public utility system, and may be permitted to retain such additional systems as the Commission may find (A) cannot be operated independently without the loss of substantial economies, (B) are located in one state or in adjoining states, and (C) are not so large in combination as to impair advantages of localized management, efficient operation or effective regulation. American has within its present holding company system six integrated public utility systems, as hereinafter described, which satisfy these statutory requirements.

35. The statutory definition of an integrated public utility system contained in Section 2(a) (29) of the Act, quoted in the margin on page 2 hereof, has not been finally interpreted with respect to the extent of the area or region which may be included without impairing the advantages of localized management, efficient operation and effectiveness of regulation, nor has there been a definitive construction of the similar requirements of paragraphs (A) and (C) of Section 11 (b) (1), or the meaning of the words "located in one state or in adjoining states" contained in paragraph (B) of said Section 11(b) (1). With respect particularly to this language, it has not as yet been determined whether the additional systems must be located in states adjoining the principal system, or whether it is merely necessary that the additional systems must be in states adjoining each other. If the former interpretation be adopted and confirmed by the courts, American Company may retain only a single system or systems in adjoining states. American Company's choice as to which properties to retain would thus be limited to the North-

western group of properties, the Texas group, the Kansas-Nebraska group, the Minnesota-Wisconsin group, Florida Power & Light Company, or Central Arizona Light and Power Company. If, however, the latter interpretation be adopted, American could choose as its principal integrated system any one of these, and in addition thereto, with the Commission's approval, could retain any other regional system or systems in one state or adjoining states regardless of location with respect to the principal system. American Company reserves the right to contend for this latter construction and to elect to retain any one of these systems referred to as its principal integrated system, and any one of the remaining groups as an additional integrated system.

VIII.

The Northwestern Integrated System

36. The Northwestern group of public utility companies includes Pacific Power & Light Company (including Inland Power & Light Company), Portland Gas & Coke Company, Northwestern Electric Company, The Washington Water Power Company and The Montana Power Company, and the non-public utility subsidiaries in the states supplied by these companies. Unless part or all of this group of properties is retained under the control of American Company it is proposed that a Northwestern holding company shall be created or chosen which shall acquire American Company's holdings in any or all of the companies in the Northwestern group.

37. The American Company's electric subsidiaries in the Northwestern System constitute a completely integrated electric public utility system within the definition of Section 2(a) (29) of the Act. It combines advantages of geographic, economic and climatic diversity with diversity of power supply, both as to location and as between steam

and water power, in such manner as to promote the maximum efficiency and economy of operation as a single system. It is operated as a single system in which the engineering problems of power supply and transmission are conducted and administered jointly in the most efficient and beneficial manner for all the companies considered as a group, and the local business of selling and distributing electric energy is under the separate control of the different companies serving their respective areas so as to preserve complete efficiency, economy and independence of local management under the local regulation of State authority.

38. If the Northwestern System may not be considered as a single system, considering The Washington Water Power Company as the primary or central system having its center in Spokane, Washington, practically on the Idaho boundary and serving northern Idaho and eastern Washington, the systems of The Montana Power Company and the combined systems of Pacific Power & Light Company (including Inland Power & Light Company), and Northwestern Electric Company are additional systems satisfying the requirements of Subparagraphs (A), (B) and (C) of said Section 11(b) (1). They cannot be operated as independent systems without the loss of substantial economies which can only be secured by retention of control by a holding company, are located in the same or adjoining states to the central or principal system, and their continued combination is not so large as to impair advantages of localized management, efficient operation or the effectiveness of regulation.

39. Portland Gas & Coke Company is a gas utility and as such, under ruling of the Securities and Exchange Commission, may be considered as an independent system and not as a part of the integrated electric utility system, but likewise satisfies the requirements of said Paragraphs (A), (B) and (C) of said Section 11 (b) (1). American Com-

pany, with the approval of the Securities and Exchange Commission, has recently made a substantial investment in the common stock of said Portland Gas & Coke Company for the purpose of developing by-product business. This will require a considerable period of time, and gives promise of substantially increasing the value of American Company's holdings in Portland Gas & Coke Company. These holdings should be retained by the reorganized American Company, or by such holding company as may be created for the Northwestern group of properties, for a sufficient length of time to permit realization of these values. If, as and when either said company or its properties may be sold to advantage, they may be so sold either by American Company or the Northwestern holding company.

40. It is believed that the non-utility properties of, or businesses conducted by, the companies mentioned in paragraph 10 hereof, which conduct their operations in the Northwestern states, may properly be retained as "other businesses reasonably incidental or economically necessary or appropriate to the operations" of the Northwestern public utility system. Glacier Production Company, Inland Empire Refineries, Inc., Moen-Leick Industries, Inc. and Chief Petroleum Company are out-growths of the natural gas business, with its attendant oil development of The Montana Power Company, and are necessary to the successful production, refining and disposal of such gas or oil products. Great Falls Townsite Company was acquired by The Montana Power Company by succession to properties of earlier companies in their historical development. Spokane United Railways was developed originally as a street railway in conjunction with the development of the power business of The Washington Water Power Company, but is now largely a bus company. The stock interests of the public utility subsidiaries of American Company in Yakima

Credit Corporation, R. S. & C. Irrigation Company, Inc., Chelan Valley Credit Corporation, Okanogan-Douglas Credit Corporation and Omak Credit Corporation were acquired principally in connection with programs of agricultural developments essentially as community enterprises. Columbia Highlands Company and The Limestone Company are continuing in business merely as convenient depositories of real estate titles. American Company and its subsidiaries would willingly dispose of its interests in all these companies, other than the gas and oil group first above mentioned, after taking title to any land now held by the land companies which it might be desirable to retain, if, as and when any opportunity for disposal of these investments on satisfactory terms arises.

41. While the Northwestern System as above defined is the largest single integrated system, or group of systems, within the present American Company holding company system, involving its largest investments, property accounts, consolidated capitalization and earnings, the future of such system depends upon the outcome of the Federal government power prograr in the northwest.

42. It is possible that it may be found desirable to sell certain of the properties of American's subsidiaries in the Northwestern group, which are presently confronted with the problems of potential competition with government financed Bonneville and Grand Coulee power projects, to public utility districts or other power systems, including such authority as may be created to administer the government projects. Sale of substantial parts of these properties to the Federal government, or to municipalities or other public bodies, might result in the destruction of the system as at present constituted.

43. The foregoing considerations preclude the formulation at this time of any definite program for the corporate and inter-corporate structure of such company as may be

created to hold American Company's investment in the Northwestern System but it is expected that the policies to be pursued by the Federal government in the distribution of power from Bonneville and Grand Coulee will be made definite at a reasonably early date, so as to permit of the formulation of a definitive program with respect to Northwestern System, including the determination whether it should be retained by American Company, or placed in control of a newly created holding company.

IX.

The Texas System

44. It is proposed that the Texas group of properties, consisting of Texas Power & Light Company, Texas Electric Service Company and Texas Public Utilities Corporation, and as a system in a contiguous state, New Mexico Electric Service Company, shall be grouped into an integrated public utility system controlled or operated by a company, which may be either American Company, or another company.

45. Texas Power & Light Company, Texas Electric Service Company and Texas Public Utilities Corporation presently constitute a completely integrated public utility system, the operations of which are confined entirely to the State of Texas.[6]

46. New Mexico Electric Service Company is incorporated in New Mexico and renders service entirely in Lea

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[6] The electric operations of Texas Public Utilities Corporation are unimportant, being presently confined to a small distribution system competing with a municipal system in Weatherford, Texas, and another one in Peaster, Texas, both of which should be sold if opportunity offers. In addition to its electric operations, this company owns and operates ice and water plants and systems which should likewise be sold. If satisfactory sales may be arranged, this company will be liquidated, and the proceeds of liquidation retained by the reorganized American Company, in which event it will not become a part of the Texas system as herein described.

County, New Mexico, contiguous to the western boundary of Texas. All its capital stock and other obligations are owned by American Company. The capitalization, plant and earnings are too small for distribution to stockholders of American Company, and it is proposed that this company remain affiliated with the Texas System operating in an adjoining state, either as a separate company, or by absorption by Texas Power & Light Company or Texas Electric Service Company.

47. Unless American Company shall elect to retain the systems mentioned in Paragraph 44 hereof, it is proposed that they shall be transferred to some other company.

48. If such other company shall be created or chosen, the common stocks owned by American Company of the companies mentioned in paragraph 44 hereof, or the properties of said companies, shall be transferred to such company. The debt obligations of Texas Public Utilities Corporation (unless discharged in liquidation) and of New Mexico Electric Service Company to American Company will be likewise transferred to such company.

X.

The Kansas-Nebraska System

49. The Kansas Gas and Electric Company and Nebraska Power Company have heretofore operated as entirely separate systems in adjoining states. Construction is in progress for the interconnection and integration of their physical operations through a 154 k.v. transmission line. The object of the interconnection and integration is to provide for transfers of large quantities of electric power and energy between the systems of the two companies, balancing their loads, and combining the reserve capacity of both companies so as to be available for the needs of either. When it is completed the systems of the two com-

panies will be operated in parallel and as a single integrated system.

50. Unless American Company shall elect to retain the Kansas-Nebraska System as part of its system, it is proposed that Nebraska Power Company shall acquire from American Company the common capital stock of Kansas Gas and Electric Company, or that American Company shall cause the properties of said two companies to be vested in one operating company, for such cash or other consideration as may be approved by the Commission. Cash or other consideration so received by American shall be used either as working capital or towards the discharge of its debenture obligations.

XI.

The Minnesota-Superior System

51. Minnesota Power & Light Company, Northern Power Company and Superior Water, Light and Power Company operate as a single integrated system in northern Minnesota, and in a contiguous area in and about Superior, Wisconsin, with principal offices in Duluth, Minnesota, and Superior, Wisconsin, respectively. Minnesota Power & Light Company is the source of the greater part of the electric power and energy produced and distributed in this region. Northern Power Company is primarily a transmission and distributing company interconnecting the Minnesota and Superior properties and supplying power customers in Superior. American Company owns all the stock and debt obligations of Northern Power Company, and all the debt and capital obligations, except $109,000 of debt and 3,337 shares of the preferred stock, of Superior Water, Light and Power Company, and also owns all the securities, including debt, of the non-utility Topeka Land Company, mentioned in paragraph 10 hereof. Topeka Land Company owns real estate and water rights acquired for

further development of the utility plant of Minnesota Power & Light Company, which should be retained as incidental to the public utility business of that company.

52. It is proposed that Northern Power Company and Superior Water, Light and Power Company shall be merged into a single corporation serving the Superior district in northern Wisconsin.

53. Unless American Company shall elect to retain the Minnesota-Superior System, it is proposed that the Minnesota Power & Light Company shall acquire the stocks and other capital obligations of the combined Northern and Superior Companies, and of Topeka Land Company, and shall continue the present operations of the integrated system as predominately a public utility company whose operations do not extend beyond the state in which it is organized and a contiguous state.

XII.

Other Systems

54. Florida Power & Light Company should retain title to the stock presently held by it in Consumers Water Company, subject, however, to sale when, as and if opportunity offers. American Company should transfer to the Florida Power & Light Company its title to the stock and any other securities held by it in the Utilities Land Company. The land owned by this company so far as necessary or desirable should be held for future development of the public utility operations of Florida Power & Light Company, and any land not so required should be sold as opportunity offers. No change is proposed as to Central Arizona Light and Power Company.

XIII.

Reservation of Right to Include Additional Properties in Proposed Systems and of Right to Adopt Alternative Methods of Distribution

55. There is present the possibility of including within the systems referred to in Articles VIII, IX, X, XI and XII, as additional components thereof, certain other properties which are either presently physically interconnected with or capable of physical interconnection with such systems. No concrete proposal is made for the inclusion of such properties in such systems, but the right is reserved to offer evidence as to the economic advantages of any such inclusion, with a view to showing that these other properties may properly be included as part of a single integrated public utility system or as additional systems satisfying the requirements of Paragraphs (A), (B) and (C) of Section 11(b) (1) of the Act. The right is also reserved to finance the acquisition of such additional properties by the issuance of securities by companies in such systems, or to use any available cash of American Company or the proceeds of any securities which may be issued by such companies or American Company to finance any such acquisition.

56. If the Commission shall disapprove, in whole or in part, of the proposals for the creation or selection of the integrated public utility systems described in Articles VIII, IX, X, XI and XII hereof, or any of them, or if, by reason of legal or practical difficulties, it shall be found in the opinion of the directors inadvisable to transfer or cause to be transferred the properties or stocks of any of the present subsidiary operating companies to another company or companies, as proposed in said Articles, the right is reserved under this Plan, and without amendment thereof,

to distribute directly to the holders of the reclassified stock of American Company the stocks of any of said subsidiaries which are not retained by American Company as parts of its integrated system or systems.

XIV.

Changes in Subsidiary Capitalization

57. It is proposed that the numbers of shares of common stock of newly created companies or existing subsidiary companies may be stated or restated into such a number of shares as may avoid excessive transfer taxes and may be so proportioned to the reorganized American shares of common stock outstanding that convenient units or fractions may be readily distributed to the holders of the reclassified American Company stock. Existing subsidiary companies may also, from time to time refund all or part of their outstanding securities, or otherwise readjust their capital structures.

XV.

Ultimate Distribution of Common Capital Stock

58. Upon completion of the above proposed restatement of capital of the reorganized American Company and of the subsidiary companies and subject to possible use for retirement of debentures or preferred stock, there would be available to each unit, as herein defined, of American Company's present capitalization shares or fractional shares of stock in the following systems or companies:

American Company as reorganized
The Northwestern System
(See Par. 36 to 43)
The Texas System
(See Par. 44 to 48)
Kansas-Nebraska System
(See Par. 49 and 50)

Minnesota-Superior System
(See Par. 51 to 53)
Florida Power & Light
Company
Central Arizona Light and
Power Company

Subject to the retention by the reorganized American Company of not to exceed two of these systems or companies, and also subject to the considerations hereinbefore mentioned of possible use of shares of any of its subsidiaries in connection with the discharge of, or provision for, the debentures or in exchange for the present preferred stock, it is proposed that, upon ultimate consummation of the Plan, all remaining shares or fractional shares in the above systems or companies be distributed to the units of American Company's present capitalization.

59. Whether, after determination of the integrated public utility system or systems to be retained by American Company, it would be advisable to distribute the stocks of the companies composing or controlling these systems, and completely liquidate American Company, or whether American should continue to function as a holding company for such system or systems, cannot be decided until such system determination is made. The right to propose complete liquidation of American Company by amendment to this Plan is expressly reserved.

XVI.

Mechanics of Plan

60. This Plan herein outlined is to be submitted forthwith to the Securities and Exchange Commission for its consideration. The right is reserved to the Company, acting through its Board of Directors, to propose amendments and to accept amendments suggested by the Commission or

its staff. All stockholders of record of American Company will be advised of the filing of this Plan and, in summary form, of the contents thereof, and will be kept informed from time to time of developments in connection therewith. Copies of the Plan will be available to stockholders upon request.

61. Upon consideration and final approval of the Plan by the Commission and the Board of Directors, including any amendments proposed and adopted, the Board of Directors will call a stockholders' meeting with the stated objective of submission of the Plan for approval.

62. The Board of Directors is advised by Counsel that, under applicable laws and charter and by-law provisions, the stock vote of 90 percent. of each class of preferred stock ($6 and $5) and a majority of the common stock will be required to effectuate the Plan. Therefore, the Plan will not become effective unless 90 percent. of each class of preferred stock shall affirmatively vote to accept the Plan, in addition to the required vote of common stock.

63. It may be found necessary or desirable, if the Commission should approve the proposed reclassification of American Company stock, reserving for later consideration the determination of the integrated public utility system or systems which American Company shall be entitled to retain, to submit to stockholders' vote separately the question of approval and authorization of the reclassification of stock. In this event, the right is reserved to so submit the reclassification proposal separately to vote of stockholders, and to effectuate such reclassification in advance of determination of the other problems presented by the Plan.

XVII.

Alternatives to Plan

64. The Board of Directors is advised by Counsel that if some such Plan, as herein outlined, is not adopted by voluntary action of sufficient stock vote to make the same legally and practicably effective, the only other voluntary course left to the Company and its stockholders would be a formal statutory dissolution, requiring a majority vote of all stock, under which the Company (or a receiver or trustee appointed for it) would be required to sell or otherwise liquidate assets and holdings of the Company, applying the proceeds (1) to the discharge of debentures and other debt, and (2) to the retirement of preferred stock, including arrearages, and distributing the balance, if any, to common stockholders either in cash or in kind.

65. Without attempting to appraise the approximate realization under such a statutory dissolution, the Board of Directors is of the opinion that such a dissolution would result in excessive losses to stockholders. The long continued depression, followed by a period of unstable business conditions, accompanied by high taxes, increased expenses and government competition, and now aggravated by war and worldwide economic dislocation, render extremely problematical the results of a liquidation involving sale of assets and discharge of debt and preferred stock obligations, in their order of priority.

66. Since a voluntary statutory dissolution appears impractical, it may be assumed that the only alternative to the adoption of some such voluntary plan as herein proposed would be to await the action of the Securities and Exchange Commission under the pending proceedings under Section 11(b). In event the Commission by its order should require the dissolution of American Company and such order be enforced by a court, such dissolution would

be administered by a court through a proceeding in which a trustee may be appointed to hold or administer the assets of the Company, pursuant to Section 11 (d) of the Public Utility Holding Company Act of 1935.[7] Such dissolution would have all the incidents, expenses, delay and uncertainty of an equity receivership or a bankruptcy reorganization.

XVIII.

Recommendation of Plan

67. This Plan has been formulated as a proposal which in the judgment of the Directors will be in the ultimate interest of all security holders of the Company, and which offers a preferable alternative to either a statutory dissolution, or a dissolution pursuant to order of the Securities and Exchange Commission. If approved by that Commission, the Plan will be offered to stockholders merely as a recommendation for their consideration or rejection in discharge of what the Directors conceive to be their duty, to propose what seems to them the best solution of a difficult problem.

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[7] Section 11(d).

"(d) The Commission may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce compliance with any order issued under subsection (b). In any such proceeding, the court as a court of equity may, to such extent as it deems necessary for purposes of enforcement of such order, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction, in any such proceeding, to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer under the direction of the court the assets so possessed. In any proceeding for the enforcement of an order of the Commission issued under subsection (b), the trustee with the approval of the court shall have power to dispose of any or all of such assets and, subject to such terms and conditions as the court may prescribe, may make such disposition in accordance with a fair and equitable reorganization plan which shall have been approved by the Commission after opportunity for hearing. * * *."

68. All statements herein are made with full reservation of legal and constitutional rights of the Company, its subsidiaries, and its and their security holders.

By order of the Board of Directors.

AMERICAN POWER & LIGHT COMPANY
Howard L. Aller, President

Two Rector Street, New York, N. Y.
July 23, 1941.

SCHEDULE I

American Power & Light Company
Principal Investments in Subsidiaries
December 31, 1940

Central Arizona Light and Power Company:			
Common stock		840,000 shares	(100%)
Florida Power & Light Company:			
6% Gold Debenture Bonds, due 12/31/1951	$ 22,000,000		
$7 Preferred stock		13,477 shares	(8.6%)
$6 Preferred stock		10,000 shares	(100%)
$7 Second preferred stock		20,000 shares	(100%)
Common stock		2,500,000 shares	(100%)
Glacier Production Company:			
4½% notes due 11/1/1940	$ 750,000		
4½% advances	$ 600,000		
Kansas Gas and Electric Company:			
Common stock		600,000 shares	(100%)
Minnesota Power & Light Company:			
$6 Preferred stock		878 shares	(1.2%)
6% Preferred stock		225 shares	(53.9%)
7% Preferred stock		865 shares	(1.0%)
Common stock		1,999,990 shares	(99.9%)
The Montana Power Company:			
5% Thirty Year Debentures due 12/1/1966	$ 10,589,900		
Common stock		2,475,583 shares	(99.7%)
Nebraska Power Company:			
Common stock		965,991 shares	(96.5%)

New Mexico Electric Service Company:			
6% advances	$ 80,000		
6% note due on or before 11/25/1940	$ 497,000		
Capital stock	37,497	shares	(99.9%)*
Northern Power Company:			
Demand loans—5% interest if earned	$ 794,000		
Capital stock	247	shares	(98.8%)*
Northwestern Electric Company:			
4½% Debentures due 9/1/1959	$ 2,660,000		
Common stock	100,000	shares	(100%)
Pacific Power & Light Company:			
6% note due on or before 11/25/1940	$ 2,794,500		
Common stock	1,000,000	shares	(100%)
Portland Gas & Coke Company:			
Common stock	311,119	shares	(99.9%)*
Superior Water, Light and Power Company:			
5% demand loans	$ 1,636,000		
7% Preferred stock	1,663	shares	(33.2%)
Common stock	4,995	shares	(99.9%)*
Texas Electric Service Company:			
Common stock	5,999,900	shares	(99.9%)*
Texas Power & Light Company:			
First Mortgage Bonds, 4¾% Series due 9/1/1965	$ 4,900,000		
Common stock	4,000,000	shares	(100%)
Texas Public Utilities Corporation:			
6% note due on or before 11/25/1940	$ 330,000		
Income note due on or before 11/30/1940	$ 2,500,000		
Capital stock	9,998	shares	(99.9%)*
The Washington Water Power Company:			
Common stock	2,533,840	shares	(99.6%)

* All except directors' shares.

Schedule II

AMERICAN POWER & LIGHT COMPANY

Mortgage Bonds and Debentures of Subsidiaries Held by Public

December 31, 1940

Company and Issue	Rate	Maturity	Outstanding	Held Intercompany	Held in Treasury	Held by Public
MORTGAGE BONDS:						
Central Arizona Light and Power Company:						
First Mortgage Bonds, 3½% Series	3½%	12/1/1966	$ 6,500,000.00	—	—	$ 6,500,000.00
Florida Power & Light Company:						
First Mortgage Gold Bonds, 5% Series	5%	1/1/1954	52,000,000.00	—	—	52,000,000.00
Kansas Gas and Electric Company:						
First Mortgage Bonds, 3¼% Series, due 1970	3¼%	4/1/1970	16,000,000.00	—	—	16,000,000.00
Minnesota Power & Light Company:						
First and Refunding Mortgage Gold Bonds, 5% Series	5%	6/1/1955	10,700,000.00	—	—	10,700,000.00
First and Refunding Mortgage Gold Bonds, 4½% Series	4½%	5/1/1978	18,000,000.00	—	—	18,000,000.00
Great Northern Power Company First Mortgage Five Per Cent. Gold Bonds	5%	2/1/1950	5,224,000.00	—	—	5,224,000.00
The Montana Power Company:						
*First and Refunding Mortgage Bonds, 3¼% Series	3¼%	12/1/1966	46,273,000.00	—	—	46,273,000.00
**Butte Electric and Power Company Five Per Cent. First Mortgage Gold Bonds	5%	6/1/1951	3,016,000.00	—	—	3,016,000.00
Nebraska Power Company:						
First Mortgage Gold Bonds, 4½% Series	4½%	6/1/1981	16,500,000.00	—	—	16,500,000.00
Northwestern Electric Company:						
First Mortgage Bonds, 4% Series due 1969	4%	9/1/1969	6,700,000.00	—	—	6,700,000.00
Pacific Power & Light Company:						
***First Mortgage and Prior Lien Gold Bonds, 5% Series	5%	8/1/1955	20,500,000.00	—	—	20,500,000.00
Portland Gas & Coke Company:						
†First and Refunding Mortgage Five Per Cent. Gold Bonds due 1940 extended in part to 1950	5%	1/1/1950	9,424,000.00	—	§ 2,986,000.00	6,438,000.00
†First Lien and General Mortgage Gold Bonds, Series of "4½s due 1940" extended in part to 1950	4½%	1/1/1950	2,930,000.00	—	3,000.00	2,927,000.00
Portland Gas Company First Mortgage 5% Gold Bonds	5%	8/1/1951	750,000.00	—	‖ 379,000.00	371,000.00
Superior Water, Light and Power Company:						
First Consolidated Mortgage Gold Bonds, Series 1, 5%	5%	11/1/1965	124,000.00	—	15,000.00	109,000.00
Texas Electric Service Company:						
First Mortgage Gold Bonds, 5% Series.	5%	7/1/1960	33,730,000.00	—	—	33,730,000.00
Texas Power & Light Company:						
First and Refunding Mortgage Gold Bonds, 5% Series	5%	11/1/1956	26,650,000.00	—	—	26,650,000.00
First Mortgage Bonds, 4¼% Series	4¼%	9/1/1965	15,000,000.00	$4,900,000.00	—	10,100,000.00
The Washington Water Power Company:						
First Mortgage Bonds, 3½% Series	3½%	6/1/1964	22,000,000.00	—	—	22,000,000.00
TOTAL MORTGAGE BONDS, PER CONSOLIDATED BALANCE SHEET						$303,738,000.00
DEBENTURES:						
Kansas Gas and Electric Company:						
Six Per Cent. Gold Debenture Bonds, Series A	6%	9/1/2022	$ 3,000,000.00	—	—	$ 3,000,000.00
Nebraska Power Company:						
Six Per Cent. Gold Debenture Bonds, Series A	6%	9/1/2022	3,500,000.00	—	—	3,500,000.00
Texas Power & Light Company:						
Six Per Cent. Gold Debenture Bonds, Series A	6%	7/1/2022	2,000,000.00	—	—	2,000,000.00
TOTAL DEBENTURES, PER CONSOLIDATED BALANCE SHEET						$ 8,500,000.00
TOTAL MORTGAGE BONDS AND DEBENTURES OF SUBSIDIARIES						$312,238,000.00

NOTES:

* All common stock and debentures of Glacier Production Company, a subsidiary of The Montana Power Company, are pledged as collateral to this issue.

** Part of the capital stock of a minor subsidiary of The Montana Power Company is pledged as collateral to this issue.

*** All capital stock (except directors' shares) and demand note of Inland Power & Light Company, a subsidiary of Pacific Power & Light Company, are pledged as collateral to this issue.

§ $2,930,000 principal amount of these bonds are pledged as collateral to Portland Gas & Coke Company First Lien and General Mortgage Gold Bonds, Series of "4½s due 1940".

‖ Pledged as collateral to Portland Gas & Coke Company First and Refunding Mortgage Five Per Cent. Gold Bonds.

† See note to consolidated balance sheet relating to the extension of these bonds.

AMERICAN POWER & LIGHT COMPANY

Preferred Stocks of Subsidiaries Held by Public

December 31, 1940

Company	Par Value	Dividend Rate	Number of Shares: Outstanding Less Intercompany	Number of Shares: Reacquired	Ba... P...
Central Arizona Light and Power Company ..	No Par	$7	7,500	12	
Central Arizona Light and Power Company ..	No Par	$6	9,774	501	
Florida Power & Light Company	No Par	$7	*146,523	3,856	*(
Kansas Gas and Electric Company	$100	7%	66,500	3,882	(
Kansas Gas and Electric Company	No Par	$6	15,511	1,768	1
Minnesota Power & Light Company	$100	7%	79,208	—	
Minnesota Power & Light Company	$100	6%	192	—	
Minnesota Power & Light Company	No Par	$6	70,424	—	
The Montana Power Company	No Par	$6	159,589	—	15
Nebraska Power Company	$100	7%	52,000	38	
Nebraska Power Company	$100	6%	23,000	439	2
Northeastern Electric Company	$100	7%	47,593	326	
Northwestern Electric Company	$100	6%	555	—	
Pacific Power & Light Company	$100	7%	58,100	1,676	1
Pacific Power & Light Company	No Par	$6	10,585	—	1
Portland Gas & Coke Company	$100	7%	54,580	595	5
Portland Gas & Coke Company	$100	6%	8,712	—	
Superior Water, Light and Power Company ..	$100	7%	3,337	—	
Texas Electric Service Company	No Par	$6	65,000	2,387	4
Texas Power & Light Company	$100	7%	65,000	146	6
Texas Power & Light Company	No Par	$6	68,786	274	6
The Washington Water Power Company	No Par	$6	103,753	—	10
TOTAL			1,116,222	15,900	1,10

* Including 12 shares issuable in exchange for preferred stocks of merged company.

Schedule IV

AMERICAN POWER & LIGHT COMPANY

Balance Sheet—December 31, 1940

ASSETS

INVESTMENT SECURITIES AND ADVANCES—SUBSIDIARIES (Ledger value—based on company's valuations of securities acquired for securities issued and on cash costs, less adjustments, and less net proceeds received and other credits arising through disposal of investments included in group valuations. Losses or gains arising through the disposal of bonds and other investments included in group valuations—undeterminable in the absence of individual valuations—are included in ledger value.)		$252,262,215.73
CURRENT ASSETS:		
Cash in banks—on demand	$ 9,207,768.16	
Special cash deposits	76,843.00	
Temporary cash investments:		
United States Government guaranteed securities	2,011,172.76	
State, municipal, and other short-term securities	8,315,186.57	
Accounts receivable from others than subsidiaries	1,369.63	
Accrued interest receivable:		
Subsidiaries	194,193.41	
Others	40,891.18	
Dividends receivable—subsidiaries	478,429.07	
Other current assets	251.80	
Total current assets		20,326,105.58
DEFERRED CHARGES:		
Prepayments	$ 9,012.50	
Unamortized debt discount and expense	3,265,452.02	
Total deferred charges		3,274,464.52
TOTAL		$275,862,785.83

LIABILITIES

CAPITAL STOCK (no par value):		
Preferred ($6), cumulative (entitled upon liquidation to $100 a share); pari passu with $5 preferred; authorized, 1,000,000 shares; outstanding, 793,581 2/10 shares, including 26 2/10 shares of scrip	$79,300,926.00	
$5 preferred, cumulative (entitled upon liquidation to $100 a share); pari passu with preferred ($6); authorized, 2,200,000 shares; outstanding, 978,444 shares	97,844,400.00	
Common: authorized, 4,000,000 shares; issued, 3,013,812 27/50 shares, less 5,301 shares reacquired and held by company; outstanding, 3,008,511 27/50 shares, including 2,013 27/50 shares of scrip	37,434,351.29	
Total capital stock		$214,579,677.29
LONG-TERM DEBT:		
Gold Debenture Bonds, American 6% Series, due March 1, 2016	$42,358,000.00	
Southwestern Power & Light Company, 6% Gold Debenture Bonds, Series A, due March 1, 2022	3,903,000.00	
Total long-term debt		46,261,000.00
CURRENT LIABILITIES:		
Accounts payable	$ 346,521.20	
Accrued interest on long-term debt (including $76,423.00 matured interest for which cash is in special deposits)	1,001,643.00	
Preferred dividends declared, payable January 2, 1941	3,015,765.85	
Accrued taxes	319,159.42	
Other current liabilities	420.00	
Total current liabilities		4,684,509.47
CAPITAL SURPLUS		36025.64
EARNED SURPLUS		10,301,573.43
TOTAL		$275,862,785.83

NOTE:

At December 31, 1940 undeclared cumulative dividends amounted to $16,129,005.38 ($20.32½ a share) on the preferred stock ($6) and $16,572,395.25 ($16.93¾ a share) on the $5 preferred stock, for which no provision has been made in the above statement.

ASSETS

PLANT, PROPERTY, AND EQUIPMENT (INCLUDING INTANGIBLES) of subsidiary companies (based on ledger value)	$781,397,856.27	
Less net adjustment arising from the elimination of intercompany-held securities including balance of surplus of subsidiaries at dates of acquisition as adjusted	15,490,351.17	
Balance (including undetermined amount of cost of acquiring capital arising prior to 1932, estimated by the Company to be approximately 3% of the total plant account)		$765,907,505.10
INVESTMENT AND FUND ACCOUNTS:		
Miscellaneous securities (ledger value)	$ 563,904.60	
Non-current receivables	310,617.00	
Miscellaneous special funds	322,040.52	
Total investment and fund accounts		1,196,562.12
CURRENT AND ACCRUED ASSETS:		
Cash in banks—on demand	$ 21,545,479.45	
Cash in banks—time deposits	750,000.00	
Special deposits:		
Matured long-term debt and interest	3,245,672.08	
Other	171,006.07	
Working funds	279,764.04	
Temporary cash investments:		
United States Government obligations, direct and guaranteed	2,740,451.15	
State, municipal, and other short-term securities	13,353,829.59	
Notes and loans receivable	262,950.22	
Accounts receivable:		
Customers and miscellaneous	11,356,441.80	
Associated companies	10,087.08	
Materials and supplies	5,658,032.46	
Prepayments	455,266.24	
Other current and accrued assets	237,630.78	
Total current and accrued assets		60,066,610.96
DEFERRED DEBITS:		
Unamortized debt-discount and expense	$ 14,548,754.66	
Other	667,556.94	
Total deferred debits		15,216,311.60
REACQUIRED CAPITAL STOCK—Subsidiaries—15,900 shares preferred		1,583,463.87
CONTINGENT ASSETS (contra)		397,184.02

NOTES:

Plant, property, and equipment (including intangibles) are stated on the basis of the companies' valuation thereof at acquisition where acquired by issuance of stocks and other securities or on the basis of cost where acquired for cash or constructed, less retirements at actual or estimated cost, and do not purport to represent present realizable values or replacement cost.

It has been the general practice of the companies to provide for retirements of property by making such provisions from current income as are considered by the management necessary to provide for retirements when they occur, such provisions being in addition to expenditures included in operating expenses to maintain the properties in condition to render adequate service. The provisions made for retirements do not purport to be calculated on the basis of estimated lives of the individual units of depreciable property.

Systems of accounts prescribed by regulatory authorities for public utilities provide for depreciation and depletion accounting and reclassification of plant, property, and equipment (including intangibles). Subsidiaries subject to the systems of accounts have submitted reclassifications to regulatory commissions having jurisdiction or are preparing reclassifications, but pending final disposition thereof and final determination of the extent to which such provisions may be imposed, the effect on the companies' accounts is unknown.

Certain intercompany-held securities of subsidiaries (eliminated in consolidation) have been pledged as set forth in the detailed schedule of mortgage bonds and debentures (of subsidiaries) held by public.

Consolidated earned surplus in the above balance sheet includes approximately $4,250,000 of the earned surplus of certain subsidiaries, after consolidation adjustments, subject to restrictions created during 1939 in connection with the financing and bond extension operation of such subsidiaries.

At December 31, 1940 undeclared cumulative dividends of American Power & Light Company amounted to $16,129,005.38 ($20.32½ a share) on the preferred stock ($6) and $16,572,395.25 ($16.93¾ a share) on the $5 preferred stock, for which no provision has been made in the above statement.

*At December 31, 1940 the holders of Portland Gas & Coke Company $600,000.00 principal amount of first and refunding mortgage five per cent. gold bonds, due 1940 and $79,000.00 principal amount of first lien and general mortgage gold bonds, series of "4½s due 1940" had not become parties to the Extension Plan and Deposit Agreement dated October 27, 1939 and operative February 29, 1940, which provided for the extension of the bonds to January 1, 1950. The bonds of holders who have not yet become parties to the Extension Plan and Deposit Agreement are not included in current liabilities in the above balance sheet.

Total	$844,367,637.67

MPANY AND SUBSIDIARIES — Schedule V

December 31, 1940

LIABILITIES

CAPITAL STOCK:			
AMERICAN POWER & LIGHT COMPANY (no par value):			
Preferred ($6), cumulative (entitled upon liquidation to $100 a share); pari passu with $5 preferred; authorized, 1,000,000 shares; outstanding, 793,581 2/10 shares, including 26 2/10 shares of scrip		$ 79,300,926.00	
$5 preferred, cumulative (entitled upon liquidation to $100 a share); pari passu with preferred ($6); authorized, 2,200,000 shares; outstanding, 978,444 shares		97,844,400.00	
Common; authorized, 4,000,000 shares; issued, 3,013,812 27/50 shares, less 5,301 shares reacquired and held by company; outstanding, 3,008,511 27/50 shares, including 2,013 27/50 shares of scrip		37,434,351.29	
SUBSIDIARIES:			
Preferred stocks—1,116,222 share (entitled upon liquidation to $100 a share)		111,622,200.00	
Common stocks—48,706 shares		424,696.65	
Total capital stock			$326,626,573.94
LONG-TERM DEBT:			
AMERICAN POWER & LIGHT COMPANY:			
Gold Debenture Bonds, American 6% Series, due March 1, 2016		$ 42,358,000.00	
Southwestern Power & Light Company, 6% Gold Debenture Bonds, Series A, due March 1, 2022		3,903,000.00	
SUBSIDIARIES:			
Mortgage bonds	$303,738,000.00		
Debentures	8,500,000.00		
Miscellaneous	200,750.00	312,438,750.00	
Total long-term debt			358,699,750.00
CURRENT AND ACCRUED LIABILITIES:			
Accounts payable:			
Associated companies		$ 328,416.72	
Others		2,531,511.14	
Customers' refunds		97,840.59	
Dividends declared		4,126,634.80	
Matured long-term debt and interest (cash in special deposits)		300,672.08	
Customers' deposits		4,965,830.99	
Taxes accrued		11,828,467.77	
Interest accrued (including $2,857,140.84 for which cash is in special deposits)		5,658,568.17	
Other current and accrued liabilities		376,057.05	
Total current and accrued liabilities (see note *)			30,213,998.81
DEFERRED CREDITS:			
Customers' advances for construction		$ 666,874.95	
Unamortized premium on debt		609,375.01	
Other		319,693.18	
Total deferred credits			1,595,943.14
RESERVES:			
Property retirement and depletion		$ 67,342,210.49	
Uncollectible accounts		1,114,918.20	
Inventory adjustment		509,206.45	
Insurance		903,565.55	
Injuries and damages		1,161,357.33	
Other		1,307,828.61	
Total reserves			72,339,086.63
CONTRIBUTIONS IN AID OF CONSTRUCTION			892,653.25
CONTINGENT LIABILITIES (contra)			397,184.02
UNDECLARED CUMULATIVE DIVIDENDS ON PREFERRED STOCKS OF SUBSIDIARIES HELD BY PUBLIC			8,233,331.86
MINORITY INTEREST IN SURPLUS OF SUBSIDIARIES			196,082.88
CAPITAL SURPLUS			36,025.64
EARNED SURPLUS, LESS AMOUNT ACCRUING TO MINORITY INTEREST			45,137,007.50
TOTAL			$844,367,637.67

Schedule V

AMERICAN POWER & LIGHT COMPANY

Comparative Statement of Income and Summary of Earned Surplus

Income

	Three Months Ended December 31,		Twelve Months Ended December 31,	
	1940	1939	1940	1939
INCOME:				
From subsidiaries	$3,823,154	$4,100,414	$11,878,815	$11,645,9
Other	13,362	21,277	72,124	97,4
Total	$3,836,516	$4,121,691	$11,950,939	$11,743,3
EXPENSES, INCLUDING TAXES	240,164	147,340	648,579	455,2
BALANCE BEFORE INTEREST AND OTHER DEDUCTIONS	$3,596,352	$3,974,351	$11,302,360	$11,288,1
INTEREST AND OTHER DEDUCTIONS	707,116	711,726	2,833,623	2,892,9
NET INCOME	$2,889,236	$3,262,625	$ 8,468,737	$ 8,395,2

Summary of Earned Surplus

For the Twelve Months Ended December 31, 1940

EARNED SURPLUS, JANUARY 1, 1940	$10,259,143
ADD:	
Net income for the twelve months ended December 31, 1940	8,468,736
Adjustment of prior years taxes	22,050
Total	$18,749,930
DEDUCT:	
Dividends declared:	
Preferred stock ($6)—$5.25 a share	$ 4,166,217
$5 preferred stock—$4.37½ a share	4,280,772
Other debits	1,366
Total	$ 8,448,356
EARNED SURPLUS, DECEMBER 31, 1940	$10,301,573

Schedule VII

AMERICAN POWER & LIGHT COMPANY AND SUBSIDIARIES

Comparative Statement of Consolidated Income

Subsidiaries	Three Months Ended December 31, 1940	Three Months Ended December 31, 1939	Twelve Months Ended December 31, 1940	Twelve Months Ended December 31, 1939
Operating revenues	$27,640,280	$26,193,523	$108,221,998	$101,500,043
Operating revenue deductions:				
Operating expenses, excluding direct taxes	$10,534,594	$10,204,332	$ 41,862,950	$ 39,712,959
Direct taxes	5,420,088	3,677,378	*17,762,464	14,593,515
Property retirement and depletion reserve appropriations	2,851,159	2,608,505	10,720,240	10,040,727
Total operating revenue deductions	$18,805,841	$16,490,215	$ 70,345,654	$ 64,347,201
Net operating revenues	$ 8,834,439	$ 9,703,308	$ 37,876,344	$ 37,152,842
Other income (net)	43,409	74,440	110,552	158,242
Gross income	$ 8,877,848	$ 9,777,748	$ 37,986,896	$ 37,311,084
Interest to public and other deductions	$ 3,982,671	$ 3,970,535	$ 15,827,284	$ 15,940,046
Less interest charged to construction	38,483	2,628	63,284	14,361
Net interest to public and other deductions	$ 3,944,188	$ 3,967,907	$ 15,764,000	$ 15,925,685
Balance	$ 4,933,660	$ 5,809,841	$ 22,222,896	$ 21,385,399
Preferred dividends to public (full dividend requirements applicable to respective periods whether earned or unearned)	1,792,936	1,792,459	7,171,742	7,169,835
Balance	$ 3,140,724	$ 4,017,382	$ 15,051,154	$ 14,215,564
Portion applicable to minority interests	13,503	13,706	54,164	61,743
Net equity of American Power & Light Company in income of subsidiaries	$ 3,127,221	$ 4,003,676	$ 14,996,990	$ 14,153,821
American Power & Light Company				
Net equity of American Power & Light Company in income of subsidiaries (as shown above)	$ 3,127,221	$ 4,003,676	$ 14,996,990	$ 14,153,821
Other income	13,362	21,277	72,124	97,408
Total	$ 3,140,583	$ 4,024,953	$ 15,069,114	$ 14,251,229
Expenses, including taxes	240,164	147,340	648,579	455,217
Balance before interest and other deductions	$ 2,900,419	$ 3,877,613	$ 14,420,535	$ 13,796,012
Interest and other deductions	707,116	711,726	2,833,623	2,892,903
Balance carried to consolidated earned surplus	$ 2,193,303	$ 3,165,887	$ 11,586,912	$ 10,903,109

NOTES:

All intercompany transactions have been eliminated from the above statement. Interest and preferred dividend deductions of subsidiaries represent full requirements for the respective periods (whether paid or not paid) on securities held by the public. The "Portion applicable to minority interests" is the calculated portion of the balance of income applicable to minority holdings by the public of common stock of subsidiaries. The "Net equity of American Power & Light Company in income of subsidiaries" includes interest and preferred dividends paid or earned on securities held, plus the proportion of earnings which accrued to common stocks held by American Power & Light Company, less losses where income accounts of individual subsidiaries have resulted in deficits for the respective periods.

* Includes provisions of $815,490.00 for Federal excess profits tax.

Schedule VIII

AMERICAN POWER & LIGHT COMPANY

Common Stock Capitalization and Earnings of Principal Subsidiaries

1939-1940

Subsidiary	Common Stock: Shares Owned by A. P. & L. Co.	Common Stock: Par Value	Earnings Applicable to Common Owned by A. P. & L. Co. (Thousands): 1939	1940
Pacific Power & Light Company and Subsidiary	1,000,000	N.P.	$ 427	$ 395
Northwestern Electric Company	100,000	$ 35	292	126
Portland Gas & Coke Company	311,119	N.P.	—	—
The Washington Water Power Company and Subsidiary	2,533,840	N.P.	2,411	2,189
The Montana Power Company and Subsidiaries	2,475,583	N.P.	2,287	2,959
TOTAL NORTHWEST GROUP			$ 5,417	$ 5,669
Texas Power & Light Company	4,000,000	N.P.	$ 1,407	$ 1,114
Texas Electric Service Company	5,999,900	N.P.	999	872
Texas Public Utilities Corporation	9,998	N.P.	—	—
New Mexico Electric Service Company	37,497	N.P.	84	67
TOTAL TEXAS GROUP			$ 2,490	$ 2,053
Kansas Gas and Electric Company	600,000	N.P.	$ 671	$ 1,067
Nebraska Power Company	965,991	N.P.	1,235	1,135
TOTAL KANSAS-NEBRASKA GROUP			$ 1,906	$ 2,202
Minnesota Power & Light Company	1,999,990	$ 10	$ 383	$ 349
Northern Power Company	247	$100	—	—
Superior Water, Light and Power Company	4,995	$100	85	75
TOTAL MINNESOTA-SUPERIOR GROUP			$ 468	$ 424
Central Arizona Light and Power Company	840,000	N.P.	$ 765	$ 743
Florida Power & Light Company and Subsidiaries	(a)2,500,000	N.P.	$ 357	$ 1,329
TOTAL ALL COMPANIES ABOVE			$11,403	$12,420

(a) Earnings shown are those accruing to American Power & Light Company's ownership of entire second preferred and common stock of Florida Power & Light Company.

AMERICAN POWER & LIGHT COMPANY

Summary of Plant Account and Capitalization of Public Utility Subsidiaries

December 31, 1940

(Thousands of Dollars)

Subsidiary	PLANT			CAPITALIZATION					
				Long-term Debt		Preferred Stock		Common Stock	
	Plant Account	Reserve for Property Retirement	Plant Less Reserve	Amount	% Plant Less Reserve	Amount	% Plant Less Reserve	Amount	% Plant Less Reserve
Pacific Power & Light Company and Subsidiary	$ 44,820	$ 5,363	$ 39,457	$ 23,295	59.0	$ 6,869	17.3	$ 7,000	17.7
Northwestern Electric Company	21,467	3,004	18,463	9,360	50.7	4,815	26.1	3,500	18.9
Portland Gas & Coke Company	22,340	2,737	19,603	9,736	49.6	6,329	32.3	4,113	20.9
The Washington Water Power Company and Subsidiary	69,559	11,018	58,541	22,000	37.6	10,366	17.7	25,418	43.4
The Montana Power Company and Subsidiaries	149,739	11,185	138,554	60,079	43.3	15,869	11.4	49,633	35.8
TOTAL NORTHWEST GROUP	$307,925	$33,307	$274,618	$124,470	45.3	$44,248	16.1	$ 89,664	32.6
Texas Power & Light Company	$ 82,426	$ 4,084	$ 78,342	$ 43,650	55.7	$13,444	17.2	$ 20,000	25.5
Texas Electric Service Company	76,485	6,372	70,113	33,730	48.1	6,455	9.2	30,000	42.8
Texas Public Utilities Corporation	3,300	353	2,947	2,830(a)	96.0	—		100	3.4
New Mexico Electric Service Company	1,565	87	1,478	577(a)	39.0	—		750	50.8
TOTAL TEXAS GROUP	$163,776	$10,896	$152,880	$ 80,787	52.8	$19,899	13.0	$ 50,850	33.2
Kansas Gas and Electric Company	$ 34,943	$ 3,492	$ 31,451	$ 19,000	60.4	$ 8,227	26.1	$ 6,000	19.1
Nebraska Power Company	38,469	3,729	34,740	20,000	57.5	7,500	21.5	5,000	14.4
TOTAL KANSAS-NEBRASKA GROUP	$ 73,412	$ 7,221	$ 66,191	$ 39,000	58.9	$15,727	23.7	$ 11,000	16.6
Minnesota Power & Light Company	$ 77,945	$ 5,756	$ 72,189	$ 33,924	47.0	$14,673	20.3	$ 20,000	27.7
Northern Power Company	730	8	722	794(a)	110.0	—		25	3.4
Superior Water, Light and Power Company	4,859	853	4,006	1,745	43.5	500	12.5	500	12.5
TOTAL MINNESOTA-SUPERIOR GROUP	$ 83,534	$ 6,617	$ 76,917	$ 36,463	47.4	$15,173	19.7	$ 20,525	26.7
Central Arizona Light and Power Company	$ 15,337	$ 3,469	$ 11,868	$ 6,500	54.8	$ 1,722	14.5	$ 2,535	21.3
Florida Power & Light Company and Subsidiaries	$135,464	$ 5,832	$129,632	$ 74,000	57.7	$17,000	13.1	$ 31,954(b)	24.6
TOTAL ALL COMPANIES ABOVE	$779,448	$67,342	$712,106	$361,220	50.7	$113,769	15.9	$206,528	29.0

(a) Represents notes payable of this wholly owned company to American Power & Light Company.

(b) Includes Second Preferred Stock as well as the Common Stock.

Schedule X

AMERICAN POWER & LIGHT COMPANY

Income from Preferred Dividends and Interest

Years 1939-1940

	Security	1939	1940
Preferred Stocks:			
Florida Power & Light Company	Preferred stocks	$ 135,079	$ 192,924
Minnesota Power & Light Company	Preferred stocks	15,579	12,673
Superior Water, Light and Power Company	Preferred stock	11,641	11,641
Total preferred dividends		$ 162,299	$ 217,238
Bonds, Debentures and Other Obligations:			
Florida Power & Light Company	Debentures	$1,320,000	$1,320,000
Florida Power & Light Company	Note	36,737	—
Glacier Production Company	Notes and advances	18,656	56,363
Kansas Gas and Electric Company	Note	1,464	611
The Montana Power Company	Debentures	529,495	529,495
The Montana Power Company	Note	18,625	1,250
New Mexico Electric Service Company	Note and advances	35,328	35,197
Northwestern Electric Company	Debentures	22,750	13,038
Northwestern Electric Company	Loan	140,877	—
Pacific Power & Light Company	Note	167,065	167,670
Superior Water, Light and Power Company	Loan	82,936	83,163
Texas Power & Light Company	Mortgage bonds	232,750	232,750
Texas Power & Light Company	Notes	51,467	—
Texas Public Utilities Corporation	Notes	105,794	22,048
Utilities Land Company	Notes and loan	18,311	22,456
Total		$2,782,255	$2,596,041
Temporary short term investments		$ 97,409	$ 72,123
Total interest and preferred dividends		$3,041,963	$2,885,402

NOTE:

If adjustment be made to include dividends on preferred stocks of Florida Power & Light Company and Minnesota Power & Light Company at the regular annual rates, instead of at the rates actually paid during those years, the total interest and preferred dividends for 1939 would equal $3,058,317 and for 1940, $2,846,817.

Schedule XI

AMERICAN POWER & LIGHT COMPANY

Yearly Income from Preferred Dividends and Interest on the Basis of Holdings at December 31, 1940

	Security	Amount	Rate	Income
Preferred Stocks:				
Florida Power & Light Company	Preferred Stock	10,000 Shs.	$6	$ 60,000
	Preferred Stock	13,477 Shs.	$7	94,339
Minnesota Power & Light Company	Preferred Stock	225 Shs.	6%	1,350
	Preferred Stock	878 Shs.	$6	5,268
	Preferred Stock	865 Shs.	7%	6,055
Superior Water, Light and Power Company	Preferred Stock	1,663 Shs.	7%	11,641
		27,108 Shs.		
Total preferred at $100 per share		$ 2,710,800		
Total preferred dividends				$ 178,653
Bonds, Debentures and Other Obligations:				
Florida Power & Light Company	Debentures	$22,000,000	6%	$1,320,000
Glacier Production Company	Advance	600,000	4½%	27,000
	Note	750,000	4½%	33,750
The Montana Power Company	Debentures	10,589,900	5%	529,495
New Mexico Electric Service Company	Note and Advances	577,000	6%	34,620
Northwestern Electric Company	Debentures	2,660,000	4½%	119,700
Pacific Power & Light Company	Note	2,794,500	6%	167,670
Superior Water, Light and Power Company	Demand Loans	1,636,000	5%	81,800
Texas Power & Light Company	Mortgage Bonds	4,900,000	4¾%	232,750
Texas Public Utilities Corporation	Note	330,000	6%	19,800
Utilities Land Company	Note and Loan	301,000	6%	18,060
Total bonds, debentures and other obligations		$47,138,400		
Total interest				$2,584,645
Temporary short term investments	U. S. Government obligations	$ 2,011,173	(Estimated)	$ 40,000
	State, municipal and other short term securities	8,315,186		
Other current assets, less current liabilities		5,315,237		
Total net current assets		$15,641,596		
Total securities (as above) and net current assets		$65,490,796		
Total interest and preferred dividends				$2,803,298

EXHIBIT 2.

American Power & Light Company
Two Rector Street, New York

July 23, 1941

To the Stockholders:

The Board of Directors has authorized me to report to you concerning the present problems confronting us as directors and you as stockholders which arise from the proceedings involving your Company being conducted by the Securities and Exchange Commission under Section 11 of the Holding Company Act of 1935. Soon after the introduction in Congress of the bills which resulted in passage of the Act, stockholders were advised by special letter of March 4, 1935, of the introduction of these bills and that their purpose was to "compel the liquidation of your Company and other similar holding companies" and of the impact of the Act upon their investment. The warning was repeated in the annual report for 1934, dated June 7, 1935. In the report for 1936 it was stated "the continued existence of your Company at least in its present form, is endangered if the major provisions of the Act are held valid and applied to your Company." In the annual reports for 1939 and 1940, stockholders have been advised of the present proceedings under the Act.

Before approaching the immediate problems it may be well briefly to review the history and accomplishments of your Company.

Organization

In 1905 the General Electric Company organized the Electric Bond and Share Company to take over the securities of certain public utilities which had been acquired by the General Electric Company in connection with the sale of electrical apparatus to these utilities. The General Electric Company had difficulty in disposing of these securities

due to the general unpopularity of such securities with investors. Public utilities, especially those in small communities remote from financial centers, found it very hard to raise funds and particularly equity money for their expansion through the sale of their own securities to the public. Pursuant to the plan of corporate structure set up for the financing of these utilities, Electric Bond and Share Company organized American Power & Light Company, over thirty-one years ago, as one of its holding company subsidiaries, for the purpose of financing the acquisition and development of public utility companies including certain of those which had been acquired from the General Electric Company. The properties first so acquired were several small electric and gas properties in the states of Kansas and Oregon having a combined annual gross revenue of about two and a half million dollars.

Ownership

The Common and Preferred stocks of American Power & Light Company (sometimes called American in this letter) are owned by some 34,000 stockholders who are located in all the states of the United States, in five of its foreign possessions and in twenty-five foreign countries. Electric Bond and Share Company is the largest of these stockholders. It owns 20.7% of the outstanding shares of stock. More than half of these stockholders own 25 shares or less each and only three-tenths of one per cent of them own 500 shares or more each. The largest stockholder, other than Electric Bond and Share Company, owns about six-tenths of one per cent of the outstanding stock of American.

Growth of American

From the small beginning in 1909 American continued to grow and prosper through the acquisition of additional properties, their development and expansion. This growth and development may be visualized from the few follow-

ing facts, given in approximate round figures, embracing American and its subsidiaries:

	1910	1940
Number of Operating Utility Direct Subsidiaries	3	16
Number of Companies and Properties Acquired and Consolidated to Comprise the above Subsidiaries	10	427
Number of Communities Served	41	1,447
Number of Employees	500	14,000
Population Served	403,000	3,929,000
Number of Gas and Electric Customers	55,000	1,067,000
Total Generating Capacity in Kilowatts	27,000	1,430,000
Gross Annual Revenues Consolidated	$2,500,000	$108,000,000

Record of Earnings

What has been the record of earnings for the investor in the securities of American Power & Light Company and its subsidiaries during this period?

Interest Payments

1. There has never been a default by American Power & Light Company or any of its utility subsidiaries in the payment of interest on any bond, debenture, loan, note or other interest-bearing security outstanding with the public. Every dollar of such interest, totaling some $270,000,000 has been paid punctually on the due date.

Payment of Principal of Bonds and Debentures

2. Bonds and debentures in the principal amount of some $600,000,000 have been sold to the public by American and its subsidiaries or were outstanding at the time of the acquisition of subsidiaries. Of these, all maturing obligations have been paid on or before the maturity date except three issues with a total principal amount of some $22,000,000, the maturities of which

have been extended for a period of time. The three extensions were caused by the maturities coming at a time when the operating companies had not recovered from the effects of the recent long depression. Of these three, one was paid before the extended maturity date, and the other two have about nine years to run to maturity.

Payment by Subsidiaries of Preferred Dividends

3. There are outstanding in the hands of the public preferred stocks of American's subsidiaries in the amount of some $110,000,000. American's subsidiaries have paid some $100,000,000 in preferred dividends to the public. From 1909 to 1932 dividends were paid quarterly in full on every share of such stocks. During the recent depression and beginning in 1932 and 1933, four of the electric subsidiaries and one gas subsidiary deferred certain preferred stock dividends for a period. The deferring of these dividends was largely due to the necessity for conserving cash for construction needs during the period when public financing for such needs was practically impossible. All of the arrears on such preferred stocks of the electric subsidiaries have been paid. There remains only the gas subsidiary with any arrears on its preferred stock. American has recently made further investment of $600,000 in the common stock of this gas subsidiary to assist the expansion of its chemical by-products plant with the hope of revitalizing its business.

Payment of Dividends by American

4. American itself earned and paid full dividends for twenty-three years, from 1909 to 1933, on its outstanding preferred stock and paid common dividends from 1913 to 1932. Since January 1, 1933 American

has paid partial preferred stock dividends which have averaged about 60% of the full rates, and in 1939 and 1940 paid 87% and 87½% of the full rates, but, of course, it has paid no common dividends since 1932. Since its organization American has paid in cash a total of some $97,000,000 as preferred stock dividends and has paid in cash and stock some $38,600,000 as common stock dividends. The failure to pay the full preferred dividends in recent years, following the partial recovery of business from the darkest depression period, has been largely attributable to two causes, the increased burden of taxation and the direct or threatened competition with hydro-electric projects constructed with funds furnished by our Federal Government. American's subsidiaries have had to face such competition where, without deduction of partial costs allocated to other purposes, some $44,000,000 of Federal funds have been expanded in Texas to build hydro-electric projects on the Brazos and Colorado Rivers, $60,000,000 have been spent on Nebraska hydro-electric projects and $300,000,000, exclusive of cost of future irrigation works, will have been spent on the Bonneville and Grand Coulee projects in Washington and Oregon which will have a capacity of some two and one-half million kilowatts of hydro-electric power.

Under normal conditions and with a fair solution of the difficulties arising from competition with Federally financed projects and from the problems with other Government agencies, there would be reason to hope that American could be restored to a full preferred dividend paying basis, with arrears compensated for, and that thereafter there could be a resumption of common dividends.

Therefore, viewed as a whole and over the long period of thirty-one years of American's existence, it would appear that what American has produced and developed as a business enterprise has been exceptionally successful from the standpoint of the investor in the enterprise.

Benefits to the Public

What public service has been rendered during this period?

From the small beginning with the inefficient isolated plants and systems of 1909, there have been built large hydro-electric and steam plants of modern and efficient design. There are 36,000 miles of distribution lines and 10,000 miles of transmission lines which serve and interconnect these systems. American has been one of the leaders of the country in the construction of high voltage transmission lines. At the present time, when demand is being made by Government authorities for more high voltage transmission lines in the interest of conservation of our national power resources, it is found that American's system has over four times as many miles of such lines per kilowatt of generating capacity for the interconnection of its own system and for interconnection with other systems as the average for the entire electric utility industry in the United States. The service has been reliable, continuous and ample to meet all demands made upon American's subsidiaries. The properties have been kept abreast of the rapid improvement of the art and have been well maintained and operated by a large and efficient organization, now consisting of some 14,000 employees. The use of the service has been continuously expanded with inestimable social benefits and the cost of the service has been continuously and greatly reduced. The average rate for residential service on American's system has been reduced from 12.4¢ per kwh in 1910 to 3.5¢ per kwh in 1940. Rate

reductions even during the last five years of rapidly rising taxes and other costs have totaled some $11,000,000 of annual savings to the customers of the subsidiaries of American.

Where This Has Been Done

These accomplishments have not been in the thickly settled portion of our country. American's subsidiaries serve largely the smaller cities, towns, villages and hamlets. They serve electricity to a total of 1,354 communities, 1,205 of them having a population of less than 2,500 each and only 7 having over 100,000 of which the largest has a population of about 300,000. They are located in widely different sections of the country. It has been demonstrated that the different kinds of businesses, crops and industries in widely separated sections give to American and its family of subsidiaries a valuable diversity and, therefore, stability, and it has been considered that this more than offsets any disadvantage incident to the distance between these properties. For example, if the wheat crop in Kansas should be poor, thus adversely affecting the earnings of the Kansas subsidiary, the earnings of other subsidiaries may counteract such effect since they are largely dependent upon such factors as the cotton crop in Texas, the tourist trade of Florida, the iron ore production in Minnesota, or copper production in Montana.

But what have been the achievements of American Power & Light Company and its subsidiaries during the last ten years—the period of the great national depression and partial recovery?

Progress Toward Recovery in Recent Years

These subsidiaries have been able to meet unavoidable increases in operating costs. They have borne a staggering increase in taxes. These taxes have increased from

$7,800,000 in 1930 to $17,800,000 in 1940. This increased tax burden alone is more than equal to full annual dividends on American's preferred stock or it is equal to some $3.30 per annum on each share of its common stock. The physical properties have been maintained in first class condition and have been expanded to meet the public need. Over $48,000,000 have been spent and added to the plant accounts of the subsidiaries during the past eight years while, during the same period, the debt has been reduced by almost $10,000,000. Reserves for the replacement of property have been increased some $35,000,000 during the past decade. Rates to the consumers have been reduced constantly and for a long period of years have been substantially less than the national average in spite of the fact that American's subsidiaries serve chiefly parts of the country with a low density of population, and sparsely settled areas generally are more expensive to serve than densely populated areas with the exception of the largest cities having great underground distribution systems. Although rate reductions affecting annual revenues have totaled over $14,500,000 in the past ten years, the annual gross revenues of the American system have increased from $87,000,000 to $108,000,000, or 24% and the record of earnings, interest and dividend payments has been creditable, as recited above. There are some $37,000,000 of cash and cash equivalent securities in the treasuries of the American system and of this amount American alone has some $16,000,000.

Physical Assets Back of American's Investment

There are outstanding and owned by the public some $46,000,000 of American's long term debt, some 1,770,000 shares of its non par preferred stock and some 3,000,000 shares of its non par common stock. The stock and debentures are held by some 45,000 security holders. These

securities represent capital of some $260,000,000 on American's books, largely invested in the securities of its subsidiary operating utility companies. The aggregate of the plant accounts of these subsidiaries is $780,000,000 and their total assets $836,000,000. If there be deducted from such total assets the amounts of all debts, capital stock and liabilities outstanding, which are not owned by American, and also all reserves for the replacement of property and for other purposes, there remains some $303,000,000 of stated value on the books of American's subsidiaries against American's investment in these subsidiaries. In other words, after providing for all their liabilities, the stated plant account and assets of American's subsidiaries more than support the full stated value of all of American's outstanding securities.

It may be asked how real and substantial are the assets of these subsidiaries that support the full stated value of American's investments. The amounts placed on the books of certain of American's subsidiaries as representing the value of the plants acquired at the time of acquisition by these subsidiaries were substantially greater than the cost to American of the individual properties acquired. The amounts so recorded represented the value stated for such plants, all elements of value considered. They have in the aggregate earned a reasonable return on such values and, if the properties were to be reproduced today, estimates indicate that the cost of such reproduction in the aggregate would be substantially greater than the amounts on the books of the subsidiaries for plant and property. The values inherent in the plant accounts of American's subsidiaries at present costs of reproduction less depreciation have thus been estimated by engineers to be in the aggregate substantially in excess of the amount necessary fully to support American's stated investment in these sub-

sidiary companies after full provision for all claims of other security holders of such subsidiary companies.

This briefly is the thirty-one year record and the present status of a solvent and successful business enterprise. American is in a strong cash position and is able and willing to devote its resources in assisting its subsidiaries to supply electric power for essential national defense purposes in many parts of the country. Your Company has contributed in a large way to the welfare of the nation, to the communities and peoples served, to its large body of employees and also to the investors who have furnished the capital to make all of this possible.

Notwithstanding these favorable facts, your Company is faced with a very uncertain future, occasioned chiefly by the impact of the Public Utility Holding Company Act and particularly Section 11 thereof.

The Public Utility Holding Company Act

The Public Utility Holding Company Act was passed in August, 1935. Section 11 of the Act provides briefly, (1) that public utility holding companies may control only a single "integrated public utility system", and such additional systems as the Commission may permit them to retain on finding that they conform to certain specified requirements and (2) that the Commission shall require holding companies and their subsidiaries to take such steps as the Commission shall find necessary to insure that the corporate structure or continued existence of any company in the system does not "unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power" among security holders of the system. The requirements of additional systems which a company may be permitted to retain are that (A) each of such systems cannot be operated independently without the loss of substantial economies; (B) all such additional systems are

located in one state or in adjoining states; and (C) the combination of the systems is not so large as to impair localized management, efficient operation or effective regulation.

"Integration" Provisions of Act

With respect to the economic or political philosophy underlying the legislation, it may be said that, as originally introduced in Congress, the bill was predicated upon the hypothesis that the public utility holding company was intrinsically an evil thing and should be destroyed. While the Act was under consideration by Congress, this view became radically changed and, in the form as ultimately passed, the Act is based upon the theory that specific practices of public utility holding companies have been or may be detrimental to the public welfare and that, to eliminate abuses, the public utility holding company should be federally regulated and its operations confined by geographical and economic limitations to be specifically defined by the Commission. Consequently, the Act established a rigorous system of regulation of holding companies and their subsidiaries by the Commission, particularly in financial matters, and in addition thereto, provided in Section 11, as above stated, for the limitation of the field of individual holding company operations to "a single integrated public utility system" and such permissive additional systems as should meet the standards above described

Section 11, with other related sections of the Act, leaves wide latitude of interpretation to the discretion of the Commission in defining the limits of integrated public utility systems. Until recently it was hoped and widely believed in the industry that the Commission, recognizing the ever widening territorial and economic boundaries in which single systems could efficiently function, would adopt an interpretation of this section which would permit the

creation of major regional systems, whose size would be limited only upon proof that greater economies, more effective regulation or more advantageous management would result from such limitation of size. However, the positions so far taken by the Commission's staff in many cases indicate an interpretation of the statute which would confine the limits of individual holding company operations to a much narrower field.

Registration Under Act

The Act requires public utility holding companies to register with the Commission. After litigation concerning the constitutionality of the Act as a whole, the United States Supreme Court, in March 1938, held the registration provisions of the Act to be constitutional, but declined to pass on other provisions of the Act. Accordingly your Company registered with the Commission.

Plan for Integration Filed 1938

American Power & Light Company in November, 1938, filed with the Commission a comprehensive, though tentative, plan of integration of electric utility properties in its system as part of a general integration plan for properties in the Electric Bond and Share System. This plan envisaged the creation from the present Electric Bond and Share System of three major integrated electric systems located generally in the North Central States and Atlantic Seaboard, the South Central States, and the Pacific Northwestern States, regardless of intermediate holding company ownership of the constituent parts of the system. It was believed that if some such systems as proposed were created, your Company would properly play an important part in their creation, and probably in the subsequent control and administration of one of the resulting integrated systems and that, given the physical basis upon which the

corporate structure should rest, any necessary or desirable readjustment of corporate structure could be made. However, no opportunity has been afforded to obtain a solution of the problems on the basis of the plan of integration proposed in November, 1938.

Present Proceedings Under Section 11 of Act

In 1940 the Commission instituted proceedings against your Company and associated holding companies under the integration provisions and the provisions relating to simplicity of corporate structures of the Act. While no hearings have been held with respect to the former, extensive hearings have been held under the latter and are still in progress. In this latter case the issue is presently confined to whether the corporate existence of your Company should be discontinued to insure simplicity of structure and fair distribution of voting power in Electric Bond and Share Company system.

While the Supreme Court has not passed on the constitutionality of Section 11 of the Act and expressly left the question open for later determination if it should be raised, counsel are of the opinion, whatever doubts or convictions may be entertained as to the constitutionality of this section, that, in the existing circumstances, it is desirable to endeavor to arrive at some reasonable plan of compliance with the section which will preserve for the stockholders the substantial values in the Company's holdings. Counsel, therefore, has recommended to your Board of Directors the filing of a Plan with the Commission to achieve such objectives.

Counsel are further of the opinion that unless some such plan as here proposed is approved and adopted, and if the Commission should order the dissolution of your Company in the present proceedings and be sustained by the courts, there may result a sale of all its assets, and a distribution,

first, in payment of debt, second, to preferred stock, including arrearages, and the balance, if any, to the common stock.

Your Board of Directors is of the opinion that, in view of the distressed world conditions, the disruption of our domestic economy caused by the war and the defense program and the absence of satisfactory markets for securities, such a dissolution would result in sacrifice of values in the Company's holdings to the detriment of both preferred and common stockholders. Accordingly, your Directors have filed a Plan with the Securities and Exchange Commission and it is desired here to give its general tenor and the practical reasons which, in the opinion of your Directors, made such action desirable. No such plan can become operative until it has been approved by the Securities and Exchange Commission and then approved by stockholders.

It is anticipated that under the Plan it will be possible to exchange securities of certain of the subsidiaries which are held by American Company for some of the presently outstanding securities of American Company, or to sell only such limited amount of American Company's assets as may be found desirable for the discharge of part or all of American Company's debt or to such other extent as may be in the interest of stockholders of American Company, and thereby the losses would be substantially less than would result from a sale of all of American Company's assets under present market and world conditions. After such limited exchange or sale of securities, and the determination of such integrated public utility system or systems as American Company may be entitled to retain, the Plan proposes, in effect, to distribute the remaining securities, consisting principally of investments in the stocks of public utility subsidiaries, to the stockholders of American Company in proportion to their rights as determined upon the reclassification of stock.

The Plan proposes, in brief:

Outline of Plan

The present stock capitalization of American Power & Light Company shall be revised to consist of a single class of common stock. This stock shall be issued to present preferred stockholders on the basis of one share of new common stock (or a convenient multiple or fraction of such share) for each presently outstanding share of preferred stock, and an additional share of new common stock (or convenient multiples or fractions thereof) for each $100 of arrearages on the present preferred stock, calculated to the effective date of the Plan. Whether any differential shall be allowed in favor of the $6 Preferred Stock over the $5 Preferred Stock, in addition to the greater number of shares resulting from larger dividend arrearages, is left for future determination. The present Common Stock is to be awarded such participation in the new common stock as may be determined to be fair and equitable. The exact amount of differential, if any, to be awarded the $6 Preferred Stock over the $5 Preferred Stock and the amount of participation to be awarded the Common Stock will be determined as work on the Plan progresses.

The funded debt of the Company is to be discharged or otherwise provided for from available cash on hand and the sale or exchange of securities in the Company's portfolio.

Upon the completion of the recapitalization and discharge or provision for the funded debt, the Company will select and retain from its present systems such "integrated public utility system", or systems, as it may be entitled to retain under the Public Utility Holding Company Act, and will distribute the stocks

of the remaining subsidiaries to the holders of the new capital stock in proportion to their respective holdings, either directly or through the creation of such new companies, or combinations of existing companies, as may be found desirable and practicable. As a result, present stockholders will have certificates for shares or fractional shares of stock in the reorganized Company and in the other companies, not sold or exchanged, proportionate to their present holdings as reflected in the reclassified stock.

The Plan is not to become effective except upon approval of the Securities and Exchange Commission and the vote of 90% of the Company's $6 Preferred Stock, of 90% of the Company's $5 Preferred Stock and of a majority of the Common Stock.

Selection of "Integrated System" by American Company

In the two proceedings presently pending before the Commission, it is, in effect, charged that the operations of your Company are not confined to a single integrated public utility system and such additional systems as the Company may be permitted to retain under Section 11 (b) (1) of the Act, and that the interposition of your Company as an intermediate holding company in the Electric Bond and Share Company system complicates the corporate structure of that system and unfairly distributes voting power among security holders.

With respect to the first of these charges, it must be said that considering American Company and its subsidiaries as a system separate from Electric Bond and Share Company, it is obvious that American Company as now constituted cannot meet the statutory test of a single integrated system and additional systems in adjoining states.

A fundamental concept in the development of your Company was to diversify its holding so as to distribute the risk

of the equity capital over as wide a territory as possible. With this object consciously in view, it created or acquired public utility companies in states as widely separated as Oregon and Washington in the northwest, Florida in the southeast, Minnesota in the north, and Texas in the south, with other companies in central and western states. Therefore, if a comprehensive integration plan of Electric Bond and Share Company may not be consummated, and American Company is to continue its existence as a holding company, it must select from its operating properties a group of public utilities which may be found to constitute a single integrated system with such additional systems "in adjoining states" as it may be permitted to retain.

No final determination has as yet been made as to the interpretation of the phrase "in adjoining states", that is to say, whether the additional systems must be in states adjoining the principal system, or need merely be in states adjoining each other. Consequently, the Plan as filed with the Commission does not attempt to make a definitive selection of the systems to be retained by American Company, and claims the right to select such system, or systems, as it may be entitled to retain under such interpretation of the Act as may eventually be adopted and confirmed.

Briefly, it may be said that the Company claims in its Plan that its system comprises six integrated public utility systems consisting of the Northwestern group of properties, the Texas group, the Kansas-Nebraska group, the Minnesota-Superior group, Florida Power & Light Company and Central Arizona Light and Power Company, and claims the right to elect any two of these groups as the integrated systems which it is entitled to retain.

Whether these claims of the Company, either as to the composition of its systems, or as to the number which it may retain, may be sustained by the Commission cannot

presently be forecast. In any event, it is obvious that the Company will be required to dispose of a number of its present subsidiaries and that its future operations will of necessity be greatly curtailed.

Proposed Reclassification of Stock

With respect to the claim by the Commission of system complication and unfair distribution of voting power, it may be said that, without admitting or weighing the charges made, a reclassification of stock into a single class of common stock appears to be necessary if the corporate existence of the Company is to continue and if the values, which the Company's executives and directors believe inhere in its holdings, are to be preserved for the present security holders.

It would be a very difficult task to attempt to divide the interests in subsidiaries between preferred and common stockholders of American Company under the present stock capitalization. Therefore, as a first step, and before attempting to make a determination of the integrated systems and an election of which systems shall be retained by American Company and which distributed to stockholders, the Plan proposes a reclassification of American Company's present stock capital into a single class of common stock, in which the preferred would be recognized as having the first claim on account of its liquidating rights, including accumulated arrearages (with such differential, if any, as may be allowed the $6 Preferred Stock over the $5 Preferred Stock) and the Common Stock would be accorded such recognition as it is entitled after according full satisfaction on an equitable basis to the claims of the preferred.

No attempt is made in the Plan to determine the relative or proportionate interests of the two classes of preferred, or of the preferred and common stocks, but that question is left for factual determination, approval of the Commission

and vote of the stockholders. In such a readjustment, the preferred stock will of necessity surrender its preferences, but the common stock, in turn, will surrender its control.

This Company has been created and developed under the established law of the land which, with respect to the value of public utility properties, has been that the present fair value of used and useful property is the value on which a utility is entitled to earn a fair return. In recent years theories have been advanced which are at variance with such concept of value and which are based upon the cost, or estimate of cost, to the first individual who employed the capital to construct the utility property, or are based upon a concept of value predicated upon immediately past and immediately prospective earnings. If such basic change in the concept of value should prevail, such change might deprive investors, and especially equity investors, of substantial values in reorganization under Section 11 of the Act. The basic concept of value, as embodied in the established law, is, therefore, of great importance to investors, irrespective of the method employed in any such reorganization.

Conditions Unfavorable for Reorganization

Section 11 of the Act states that the steps required should be taken "as soon as practicable after January 1, 1938". The enforcement of the Act was held largely in abeyance until April, 1938, by reason of the constitutional test case above mentioned. By the following Fall, the "integration plan" above mentioned was formally presented to the Commission. No consideration has been given to that plan and the present move to enforce Section 11 by breaking up public utility holding company systems was instituted in the Spring of 1940.

In the meantime, the world was plunged into war and serious effects on our domestic economy became inevitable.

While it is not the purpose here to challenge the political or economic philosophy of the Public Utility Holding Company Act, it cannot be believed that the Act, containing the provisions of Section 11, would be passed if the question were presented under present conditions, or that Congress ever conceived, in passing the Act, that it would be enforced under these present conditions. However, the Act remains on the books and the Chairman of the Commission has recently stated "The first and most important truth about our policy with respect to Section 11 is that we intend to enforce it". It is for these reasons that your Directors, solely in the interest of conserving for the security holders of American the maximum value possible under the circumstances, have presented a Plan.

While reasonable men may differ as to whether the principle of diversity of investment, such as has been employed by the American Company in its development, or a principle which would restrict operations to limited areas, as provided in the Act, should be the guiding criterion for public utility or holding company operations and may differ as to what concentration or distribution of control or stock votes should be established in corporate organization, it would seem that there should be no ground for any reasonable difference of opinion as to whether or not it is wise or practicable to enforce by rapid stages the breaking up of public utility systems and the reorganization of the corporate structures of holding companies under present conditions when the inherent values cannot be realized. The Act states in nearly every important section that it shall be administered "in the interest of consumers and investors". This gives rise to the hope that the Commission and the courts will grant adequate time for an orderly reorganization under this Plan.

Ultimate Dissolution Possible

Whether upon accomplishment of all the steps contemplated by the Plan the reorganized American should continue in a limited way to exist, or whether it should be dissolved and complete distribution of all its assets be made to stockholders, is a question which cannot be determined until more definitive construction has been given Section 11 of the Act, with particular reference to the subsidiary operating utility properties which may be retained by the reorganized company.

Reservation of Rights

The Plan has been submitted with full reservation of legal and constitutional rights of the Company, its subsidiaries and its and their security holders.

Proxies or Consents Not Solicited

The problems presented, if the Plan is approved by the Commission, are for determination of stockholders. In the interest of economy a copy of the Plan in its present form is not distributed to stockholders but may be obtained on request. This letter is for your information only. It is not a solicitation for any proxy, consent or authorization, or for your approval of the Plan herein described. No such action will be requested of stockholders unless and until the Plan is approved by the Securities and Exchange Commission and, in such event, a copy of the approved Plan will be distributed to stockholders.

Respectfully yours,

By order of the Board of Directors,

HOWARD L. ALLER, President.

EXHIBIT 3.

Resolutions

Resolutions of the Board of Directors of the Company authorizing the execution and filing of this Application and any and all amendments thereto.

This certifies that this is a true and complete copy of resolutions passed at a meeting of the Board of Directors of American Power & Light Company, held at 2 Rector Street, New York, N. Y., on July 23, 1941, at which a majority of such directors was present and voting throughout:

"RESOLVED that the officers of the Company be, and they hereby are, authorized and directed to prepare, or cause to be prepared, and to execute, verify and file with the Securities and Exchange Commission an Application pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935, with amendment or amendments thereto, as prescribed by the Securities and Exchange Commission pursuant to said Act, with any and all exhibits and other instruments necessary or appropriate thereto; and further

RESOLVED that the officers of the Company be, and they hereby are, authorized and directed to take such other and further steps as in their opinion, and in the opinion of counsel for the Company, may be necessary or appropriate in aid and furtherance of the matters acted upon by the Board of Directors of the Company at this meeting as set forth in general in the resolutions adopted at this meeting."

The above resolutions have not been modified, altered or rescinded and remain in full force and effect.

WITNESS my hand and the seal of said Company this 23rd day of July, 1941.

(SEAL) D. W. JACK, Secretary

[Document No. 81.]

Copy Filed 12-6-41

Wright, Gordon, Zachry, Parlin & Cahill
(Cotton, Franklin, Wright & Gordon)
Sixty-three Wall Street, New York

December 5, 1941

Securities and Exchange Commission
1778 Pennsylvania Avenue
Washington, D. C.

Re: Electric Power & Light Corporation

Gentlemen:

Electric Power & Light Corporation is presently filing with the Commission its motion to consolidate wherein it asks that the Commission make an appropriate order consolidating the hearing upon the plan filed by Electric Power & Light Corporation pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935 (File No. 54-41) with any further hearings relating to Electric Power & Light under the pending notice and order issued under Section 11(b)(2) of such Act (File No. 59-12). A copy of this motion to consolidate is attached hereto.

In the event that counsel for the Commission shall determine to oppose the grant of such motion, Electric Power & Light Corporation respectfully requests the Commission to order that oral argument be had on such motion and to fix the time for filing briefs or memoranda as to such motion.

Respectfully submitted,

Simpson, Thacher & Bartlett
By /S/ John F. MacLane

Reid & Priest
By /S/ Frank A. Reid

Wright, Gordon, Zachry, Parlin & Cahill
By /S/ Boykin C. Wright

Counsel for Electric Power & Light Corporation

[Document No. 82.]

United States of America

Before the Securities and Exchange Commission

In the Matter of

Electric Power & Light Corporation, Applicant.

File No. 54-41.

In the Matter of

Electric Bond and Share Company, American Power & Light Company, Pacific Power & Light Company, Electric Power & Light Corporation, Utah Power & Light Company, National Power & Light Company, Ebasco Services Incorporated, Respondents.

File No. 59-12.

MOTION TO CONSOLIDATE.

[Filed December 6, 1941.]

Electric Power & Light Corporation (hereinafter called "Electric"), the Applicant in the above entitled proceeding File No. 54-41, and one of the respondents in the above entitled proceeding File No. 59-12, moves to consolidate the above entitled proceedings in so far as said proceeding File No. 59-12 relates to Electric and to hold joint hearings in said proceedings and in support of said motion shows:

1. On or about February 28, 1940, a proceeding was instituted by the Commission entitled "In the Matter of Electric Bond and Share Company and its subsidiary companies, respondents, File No. 59-3" by the issue of a "Notice of and Order for hearing pursuant to Section 11(b)(1) of the Public Utility Holding Company Act of 1935". By said notice and order it was charged (Paragraph 136) that the holding company system of Electric Bond and Share Company is not confined in its operations to that of

a single integrated public utility system within the meaning of the Act and to such other businesses as are reasonably incidental or economically necessary or appropriate to the operations of such integrated public utility system.

By the allegations of such notice and order and by the terms of the order, the holding company systems of Electric and the other respondents in said proceeding were brought under review and all of said respondents were permitted to include in their answers their claims as to the action which should be required to be taken by any of them to limit their operations so as to meet the requirements of Section 11(b)(1) of the said Act.

Aside from certain motions and the filing of a joint answer by respondents (including Electric) no hearings have been had or further action taken by the Commission under said File No. 59-3.

2. On or about May 9, 1940, the Commission instituted a proceeding against Electric Bond and Share Company and Electric and other companies in the Electric Bond and Share Company system entitled "In the Matter of Electric Bond and Share Company" et al "File No. 59-12" by "Notice of and Order for hearing pursuant to Section 11(b) (2) of the Public Utility Holding Company Act of 1935" in which it was charged (Paragraphs 46-47) that "the structure of the holding company system of Electric Bond and Share Company is unduly and unnecessarily complicated", and "voting power is unfairly and inequitably distributed among security holders of said system of said Electric Bond and Share Company".

After certain motions and proceedings not here material, the Commission on June 7, 1940, issued an order limiting such proceeding initially "to the issue of whether it is necessary to discontinue the existence of American Power & Light Company, Electric Power & Light Corporation, National Power & Light Company and American & Foreign

Power Company, Inc., or any of them, in order to insure that the structure of the holding company system of the Electric Bond and Share Company shall not be unduly or unnecessarily complicated and that voting power shall not be unfairly or inequitably distributed among security holders of such system". By subsequent order dated June 17, 1940, the proceeding was dismissed as to American & Foreign Power Company, Inc.

3. Thereafter, commencing on June 18, 1940, and subject to various adjournments, from time to time, hearings have been had before an examiner of the Commission under said Notice and Order (File No. 59-12) as limited by said order of June 7, 1940, and later order, to the above mentioned issues as stated pertaining to Electric and others of the respondents, and said hearings are still continuing.

4. Rulings of the Commission with respect to other registered holding companies indicate that Electric's capitalization must be readjusted in order to comply with Section 11(b)(2) and that Electric will be required to divest itself of certain of its holdings in order to comply with the provisions of Section 11(b)(1) of said Act.

5. Electric has prepared and filed with the Commission (File No. 54-41) its application under Section 11(e) of the Public Utility Holding Company Act of 1935 for approval of a plan to enable said Corporation to comply with Subsection (b) of Section 11 of said Act. In brief, the Plan proposes, in order to comply with Section 11(b)(2) of the Act, that the corporate structure of Electric be simplified by the reclassification of its capital stock into a single class of stock with each share having identical rights as to dividends and other distributions and as to voting, and further proposes, in order to comply with Section 11(b)(1) of the Act, that the operations of Electric be confined to a single integrated public utility system with an additional system satisfying the requirements of said Section 11(b)(1). A copy of

said Plan and of the Application for its approval is attached hereto as Exhibit I.

6. Electric believes that it would be in the public interest and in the interest of investors and consumers to consolidate the above entitled proceedings (File No. 54-41 and File No. 59-12) and to continue the present hearings under File No. 59-12, so far as they relate to Electric, in conjunction with the hearings on the Plan proposed by Electric (File No. 54-41). Such proceedings involve common questions of law and fact and to continue them with joint hearings would be conducive to orderly procedure and to economy of effort and expense and would expedite the ultimate disposal of the questions involved in both proceedings.

7. The matter at issue in the proceeding under Section 11(b)(1) of the Public Utility Holding Company Act of 1935 (File No. 59-3) in so far as Electric is concerned, is the action required to be taken by it to limit its operations so as to meet the requirements of a single integrated public utility system and additional systems imposed by Section 11(b)(1) of the Act. The proposed Plan meets the objectives and requirements of said Section 11(b)(1) in electing a single integrated system, and an additional system satisfying the requirements of Paragraphs "A", "B" and "C" of said Section 11(b)(1), and provides for the disposal of all other systems. Consideration of the Plan will, therefore, dispense with any necessity of independent consideration of or hearing under said File No. 59-3 as far as concerns the Electric system.

8. The only matter presently at issue in the proceeding under Section 11(b)(2) of the Act (File No. 59-12), as limited by the order of the Commission, dated June 7, 1940, as above mentioned, in so far as Electric is concerned, is whether or not the existence of Electric should be discontinued to insure that the structure of the holding company

system of Electric Bond and Share Company shall not be unduly or unnecessarily complicated and the voting power shall not be unfairly or inequitably distributed among security holders of such system. The Plan submitted by Electric pursuant to Section 11(e) of the Act (File No. 54-41) proposes compliance by Electric with said Section 11(b)(2) by reclassification of all its capital stock, including all classes of preferred stock and arrearages, and common stock into a single class of stock. The resulting capital structure of Electric will conform to all standards of the Act and no further questions of complex corporate structure or unfair distribution of voting power will remain as to Electric. The present position of Electric Bond and Share Company as a stockholder of Electric and the extent of its voting influence will be so altered under the proposed new capital structure as either to solve all questions of corporate simplification and voting control posed by the present notice and order as limited by the said order of June 7, 1940, or such questions will be so clarified as to simplify their solution.

9. Further continuance of the present proceeding File No. 59-12 as at present conducted and upon the issues presently pending without regard to or consideration of the Plan, can result, as to Electric, only in an order dismissing such proceeding or in an order for the dissolution of Electric. Either order would leave unsolved the problems presented by Section 11(b) of the Act. Electric, as a Registered Holding Company, is entitled under Section 11(e) of the Act to present and have considered such a Plan as it has proposed for compliance with Section 11(b). An order of dissolution pending the consideration of the Plan and determination of whether it is fair and equitable would be inconsistent with the Plan and would deny to Electric and its security holders the rights and protection expressly given them by Section 11(e) of the Act. Such an order

would also result in the sacrifice of the interests of the security holders of Electric by requiring disposal of its holdings under present unsettled world and domestic conditions and the resulting depressed markets.

10. This application is based upon the statements herein, the Plan and Application for its approval pursuant to Section 11(e) of the Act (File No. 54-41), and upon the record, including pleadings and exhibits, in the 11(b)(1) and 11(b)(2) proceedings (File Nos. 59-3, 59-12), and Electric requests leave to refer to the same in support hereof.

Wherefore Electric Power & Light Corporation respectfully requests the Commission to make an appropriate order consolidating the hearing upon the Plan herein described (File No. 54-41) with any further hearings relating to Electric under the pending Notice and Order issued under Section 11(b)(2) of the Act (File No. 59-12) and also permitting counsel for the Commission and counsel for Electric, upon motion, to incorporate by reference as a part of the proceeding as to the Plan (File No. 54-41) any specified portions of the testimony and exhibits heretofore introduced in the aforesaid proceeding (File No. 59-12) which are relevant to the said hearing upon the Plan, so that the same may constitute a part of the record upon which the Commission shall base any order or orders relating to the Plan.

Respectfully submitted,

SIMPSON THACHER & BARTLETT,
by JOHN F. MACLANE

REID & PRIEST,
by FRANK A. REID

WRIGHT, GORDON, ZACHRY, PARLIN & CAHILL,
by BOYKIN C. WRIGHT

Counsel for Electric Power & Light Corporation.

Dated, December 5, 1941.

EXHIBIT I.

UNITED STATES OF AMERICA

Before the Securities and Exchange Commission

In the Matter of

Electric Power & Light Corporation, Applicant.

File No.

APPLICATION UNDER SECTION 11 (e) OF PUBLIC UTILITY HOLDING COMPANY ACT OF 1935 BY ELECTRIC POWER & LIGHT CORPORATION FOR APPROVAL OF PLAN TO ENABLE SAID CORPORATION TO COMPLY WITH SUBSECTION (b) OF SECTION 11 OF SAID ACT.

1. The Applicant, the above named Electric Power & Light Corporation (hereinafter called "Electric"), a "registered holding company" under the Public Utility Holding Company Act of 1935 (hereinafter called the "Act"), files herewith, marked Exhibit I, a Plan on behalf of Electric, under Section 11(e) of said Act for divestment of control, securities, or other assets, or for other action by Electric to enable it to comply with Subsection (b) of Section 11 of said Act.

2. At the direction of the Board of Directors of Electric said Plan has been prepared by its executives with the advice and assistance of counsel. Such Board has approved the Plan and by resolutions adopted at a meeting of said Board held on November 28, 1941, copy of which is attached hereto, marked Exhibit II, has authorized and directed the signing and filing of this application. There are no specific provisions of the charter, by-laws or similar documents of Electric relating to the right of the person signing and filing this application to take such action on behalf of Electric. Electric is distributing to its stockholders copies of the

Plan with an accompanying letter copy of which is filed herewith, marked Exhibit III.

3. Electric is a registered holding company of a public utility holding company system under said Act having public utility subsidiaries operating in Arkansas, Mississippi, Louisiana, Texas, Colorado, Utah, Nevada, Idaho, Oregon and Wyoming. In addition Electric is included in the group of companies of which Electric Bond and Share Company is the "top holding company".

4. On or about February 28, 1940, a proceeding was instituted by the Securities and Exchange Commission entitled "In the Matter of Electric Bond and Share Company and its subsidiary companies, respondents, File No. 59-3" by the issue of a "Notice of and Order for hearing pursuant to Section 11(b)(1) of the Public Utility Holding Company Act of 1935". By said Notice and Order it was charged (Paragraph 136) that the holding company system of said Electric Bond and Share Company is not confined in its operations to that of a single integrated public utility system within the meaning of the Act and to such other businesses as are reasonably incidental or economically necessary or appropriate to the operations of such integrated public utility system.

By the allegations of such Notice and Order and by the terms of the order, the holding company systems of the Applicant and the other respondents in said proceeding were brought under review and all of said respondents were permitted to include in their answers their claims as to the action which should be required to be taken by any of them to limit their operations so as to meet the requirements of Section 11(b)(1) of the said Act.

Aside from certain motions and the filing of a joint answer by respondents (including the Applicant) no hearings have been had or further action taken by the Commission under said File No. 59-3.

5. On or about May 9, 1940, the Commission instituted a proceeding against Electric Bond and Share Company, and Electric, the Applicant herein, and also other companies in the Electric Bond and Share Company system entitled "In the Matter of Electric Bond and Share Company" *et al.* "File No. 59-12" by "Notice of and Order for hearing pursuant to Section 11(b)(2) of the Public Utility Holding Company Act of 1935" in which it was charged (Paragraphs 46-47) that "the structure of the holding company system of Electric Bond and Share Company is unduly and unnecessarily complicated", and "voting power is unfairly and inequitably distributed among security holders of said system of said Electric Bond and Share Company."

After certain motions and proceedings not here material, the Commission on June 7, 1940, issued an order limiting the proceedings initially "to the issue of whether it is necessary to discontinue the existence of American Power & Light Company, Electric Power & Light Corporation, National Power & Light Company and American & Foreign Power Company Inc., or any of them, in order to insure that the structure of the holding company system of the Electric Bond and Share Company shall not be unduly or unnecessarily complicated and that voting power shall not be unfairly or inequitably distributed among security holders of such system". By subsequent order dated June 17, 1940, the proceeding was dismissed as to American & Foreign Power Company Inc.

6. Thereafter commencing on June 18, 1940, and subject to various adjournments, from time to time, hearings have been had before an examiner of the Commission under said Notice and Order (File No. 59-12) as limited by said order of June 7, 1940, and later order, to the above mentioned issues as stated pertaining to the Applicant and others of the respondents, and said hearings are still continuing.

7. Rulings of the Commission with respect to other registered holding companies indicate that Electric's capitalization must be readjusted in order to comply with Section 11(b) (2) and that Electric will be required to divest itself of certain of its holdings in order to comply with the provisions of Section 11(b) (1) of said Act.

8. The Plan of the applicant, filed herewith, proposes:

Simplification of Corporate Structure

In order to comply with Section 11(b) (2) of the Act, it is proposed that the existing classes of capital stock of Electric (including the $7 Preferred Stock, the $6 Preferred Stock, and Second Preferred Stock, Series A ($7), including arrearages, and the Common Stock), be replaced by a single class of stock with each share having identical rights as to dividends and other distributions and as to voting. It is further proposed that such new class of Capital Stock be distributed to the holders of the existing Capital Stock on such basis as shall be determined to be fair, taking into consideration existing rights, values and other relevant factors.

Various factors make it impracticable at the present time to determine what would be a fair and equitable distribution of the new capital stock among the existing classes of Capital Stock. Accordingly, the Plan as presently submitted does not propose a basis for the distribution of the new Capital Stock or determine the extent to which Electric's Second Preferred Stock and Common Stock may be entitled to receive shares of the new Capital Stock or what rights or privileges may be accorded the holders of the option warrants.

The $31,000,000 principal amount of 5% Debentures which do not mature until 2030 will not be affected by the part of the Plan which provides for simplification of corporate structure but may be retired in whole or in part in connection with divestment of properties.

Retention and Divestment of Properties

Electric elects to retain its Southern Electric System as the integrated system which it is entitled to retain under Section 11(b) (1) of the Act, and also elects to retain its United Gas System either as a part of said integrated system, or as an additional system under said Section.

The Southern Electric System consists of the electric utility properties of Louisiana Power & Light Company, Mississippi Power & Light Company, Arkansas Power & Light Company and New Orleans Public Service Inc., together with Gentilly Development Company, Inc., and the non-utility subsidiaries owned by Arkansas Power & Light Company. Each of the electric companies in this system also owns and operates natural gas distribution systems, obtaining their supply of natural gas in whole or in part from the United Gas System with which they are integrated.

Subject to obtaining the permission of the Commission, Electric elects to retain United Gas System either as a part of said integrated system, or as an additional system under Section 11 (b) (1) of the Act. United Gas System consists of a single gas utility company as defined in the Act which with its producing and pipe line subsidiaries constitutes a coordinated system confined in its operation to a single area or region, not so large as to impair (considering the state of the art and the area and region affected) the advantages of localized management, efficient operation and effectiveness of regulation. The utility operations of the United Gas System are confined to the States of Texas, Louisiana and Mississippi which States are the same as, or adjoin, the States in which the Southern Electric System operates. Furthermore, as stated above, the United Gas System supplies from its sources of production and through its pipe lines in some cases all, and in other cases

a substantial portion, of the natural gas distributed by the gas utility properties owned by companies included in the Southern Electric System, and thus such gas utility properties are integrated with the United Gas System. The United Gas System is further interconnected with the Southern Electric System through the utilization of natural gas from the United Gas System in the generation of electric power at most of the steam power plants in the Southern Electric System. The United Gas System, considered as an additional system to the Southern Electric System, satisfies the requirements of Subparagraphs (A), (B) and (C) of Section 11(b) (1) of the Act.

Electric proposes to dispose of its holdings in Idaho Power Company, Utah Power & Light Company, Dallas Power & Light Company, Dallas Railway & Terminal Company and Northern Texas Company by sale for cash, by exchange, or by distribution to Electric's security holders, as promptly as may be practicable and consistent with the best interests of the public and Electric's security holders. The proceeds of any such disposal may be applied towards the discharge of Electric's indebtedness or may be used for other corporate purposes.

With the approval of the Commission steps to put into effect the part of the Plan proposing simplification of corporate structure or the part of the Plan proposing retention and divestment of properties may be taken without regard to the consummation of the other part of the Plan.

The foregoing summary is subject to the more complete provisions of the Plan.

9. Electric hereby requests that the original, a duplicate original, or a photo copy of this application and any and all amendments thereto, whether executed hereafter or concurrently herewith, be offered in evidence on its behalf and be received in evidence as an exhibit of Electric in any proceeding before the Commission, or any officer

thereof or any Trial Examiner designated thereby, and that the verification of such application and any amendment thereto be considered as if the persons signing such verification had personally appeared and testified orally, under oath, duly administered, in any such proceeding to the statements contained in such verification.

10. Electric hereby agrees that whenever any document constituting part of the official files of the Commission is offered or received in evidence, it is offered or received subject to the reservation that if at any future time a transcript of the record is called for, either in connection with a petition for review or otherwise, copies may be furnished in lieu of the originals.

11. Neither this application nor the Plan filed herewith nor the acceptance of or reliance upon any order, rule or regulation, or of any order or direction of the Commission, shall be deemed to be a waiver of constitutional or legal rights of Electric or any of its associate or affiliate companies, all of which are hereby expressly reserved. Electric also expressly reserves and refuses to waive any constitutional rights and expressly reserves the right to contest the constitutionality of any provision of the Act as applied to it, or of any rule, regulation or order now or hereafter made or purported to be made thereunder and specifically reserves various constitutional and legal rights and questions reserved in its motions, answers and proceedings filed and taken in connection with the said Notices and Orders of the Commission above mentioned under Sections 11 (b) (1) and 11(b) (2) of the Act hereinabove mentioned and designated as File Nos. 59-3 and 59-12, respectively. If this reservation and refusal to waive any constitutional or legal right shall be held invalid or inoperative by any court of competent jurisdiction, this application shall be deemed to have been void and of no effect from any date

specified in written notice given to the Commission by or on behalf of Electric.

Wherefore, Electric respectfully requests and moves the Commission to grant a hearing under Section 11(e) of the Act upon the Plan of Electric filed herewith, and upon the completion of said hearing, to find such Plan, as filed or as the same may be supplemented and modified, necessary to effectuate the provisions of Section 11(b) of the Act and fair and equitable to the persons affected by the Plan and to approve the Plan, and to make such further order or orders as may be just and equitable.

Pursuant to the requirements of the Public Utility Holding Company Act of 1935, the Company set forth below caused this instrument to be duly executed on its behalf by its authorized officers on this 3rd day of December, 1941.

ELECTRIC POWER & LIGHT CORPORATION
By Joe H. Gill, President

Attest:
E. H. Dixon
Secretary

SIMPSON THACHER & BARTLETT,
By John F. MacLane

REID & PRIEST,
By Frank A. Reid

WRIGHT, GORDON, ZACHRY, PARLIN & CAHILL,
By Boykin C. Wright
Counsel for Electric Power & Light Corporation.

State of New York, }
County of New York, } ss.:

The undersigned being duly sworn deposes and says that he has duly executed the attached instrument for and on behalf of the Company named herein; that he is the Pres-

ident of such Company; and that all action by stockholders, directors and other bodies necessary to authorize deponent to execute and file such instrument has been taken. Deponent further says that he is familiar with such instrument and the transactions referred to therein, and that to the best of his knowledge, information and belief the statements made in such instrument are true.

JOE H. GILL

Subscribed and sworn to before me at New York, N. Y., this 3rd day of December, 1941.

Alice M. Powell
Alice M. Powell
Notary Public, Westchester Co.

Cert. filed in N. Y. Co. No. 402 Reg. No. 2-P-257
Commission Expires March 30, 1942

EXHIBIT I.

Electric Power & Light Corporation

PLAN DATED AS OF NOVEMBER 28, 1941 FOR COMPLIANCE WITH SECTIONS 11(b) (1) AND 11(b) (2) OF THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935.

At the direction of the Board of Directors of ELECTRIC POWER & LIGHT CORPORATION (hereinafter sometimes called "Electric"), this Plan has been prepared by its executives with the advice and assistance of counsel. Electric's Board of Directors has considered and approved this Plan and has directed that it be submitted to the Securities and Exchange Commission pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935 (hereinafter sometimes called the "Act").

Introductory Statement

Electric was organized in 1925 under the laws of the State of Maine. At its organization Electric acquired hold-

ings in certain utility properties theretofore held by Electric Bond and Share Company and others, and subsequently Electric acquired interests in other public utility properties not previously held by Electric Bond and Share Company. Electric has served as a vehicle for holding, organizing, financing and developing electric and natural gas public utilities and related businesses. The expansion and growth of the operations of Electric arising from acquisitions of subsidiaries and acquisition and construction of properties during the period from December 31, 1925 to December 31, 1940, resulted in a net increase of more than $385,000,000 in the consolidated plant account of its subsidiaries and in an increase in consolidated operating revenues from $44,614,878 for the year 1925 to $114,939,237 for the year 1940.

Commencing in 1932 Electric and its subsidiaries were faced with adverse conditions resulting from the general business depression and, in addition, certain of its subsidiaries for varying periods have been confronted with special or local conditions which adversely affected such subsidiaries. In more recent years earnings have been adversely affected by increased taxes and operating expenses, and by reduced electric and gas rates and the direct and indirect effects of government competition.

Notwithstanding adverse conditions, Electric and its principal subsidiaries consistently have kept their properties in prime operating condition, have conducted efficient operations, have expanded and added to their facilities as justified by service requirements, and have maintained a sound financial position. Thus in the period from 1933 through 1940 Electric's subsidiaries added $150,600,000 to their plant accounts, largely by expansion of and addition to existing facilities, while retirements, sales and other adjustments to plant accounts in the amount of $109,900,000 were effected, resulting in a net increase in the consolidated plant account of Electric's subsidiaries

of approximately $40,700,000. In the same period, property retirement and depletion reserves were increased by more than $38,000,000. Cash and cash items have increased nearly $16,000,000, while publicly held debt has been reduced about $20,300,000.

Electric itself has at all times met its maturing obligations and has paid all interest accruing on its funded and other debt. As of September 30, 1941, Electric had current assets of $5,616,033 (including $5,236,655 cash in banks) as against current liabilities of only $737,771, and its only funded debt consisted of $31,000,000 principal amount of Gold Debentures, 5% Series, due 2030. Electric paid full dividends upon its $7 and $6 Preferred Stocks until October, 1932, and upon its Second Preferred Stock until May, 1932. During the years 1928 and 1932 it also paid dividends upon its Common Stock. Since 1932, Electric has paid no dividends upon its Second Preferred or Common Stock. The only dividends which Electric has declared since 1932 on its $7 and $6 Preferred Stocks are the dividends of 35 cents per share on the $7 Preferred Stock and 30 cents per share on the $6 Preferred Stock, which were paid on December 31, 1940, April 1, July 1, and October 1, 1941 and the dividends in like amounts declared for payment on January 2, 1942. Thus, large arrearages of dividends have accumulated on its preferred stocks. As at December 31, 1940, the undeclared cumulative dividends on the $7 and $6 Preferred Stocks aggregated $41,652,266 and the undeclared cumulative dividends on the Second Preferred Stock, Series A ($7), amounted to $4,620,639.

Electric is a "registered holding company" within the meaning of the Public Utility Holding Company Act of 1935. Subdivision (2) of Section 11 (b) of the Act contains provisions requiring the simplification of the corporate structure of a holding company system and the fair and equitable distribution of voting power therein. Electric is

a party respondent to a proceeding (Commission's file No. 59-12) brought by the Securities and Exchange Commission under Subdivision (2) of Section 11(b). Extended hearings have already been held therein, but such proceeding has not as yet been completed. However, rulings of the Commission with respect to other registered holding companies indicate that Electric's capitalization must be readjusted in order to comply with the provisions of Section 11(b) (2). Subdivision (1) of Section 11(b) of the Act contains provisions requiring that the operations of a holding company system be limited to one or more integrated public utility systems and other businesses reasonably incidental thereto. Subdivision (29) of Section 2 (a) of the Act gives a definition of an integrated public utility system. Electric is a party respondent to a proceeding (Commission's file No. 59-3) brought by the Commission under Subdivision (1) of Section 11(b). No testimony has been taken in such proceedings; but rulings of the Commission with respect to other registered holding companies indicate that Electric will be required to divest itself of certain of its holdings in order to comply with the provisions of Section 11(b) (1).

The text of Section 11(b) and Section 2 (a)(29) is for convenience annexed hereto as Exhibit 1.

Electric has an important function to perform in its field, and it is believed that its continued existence is in the public interest and in the interest of consumers and its security holders and is consistent with the provisions of the Act. Over a period of years substantial progress has been made by Electric and its subsidiaries in effecting simplification of their corporate structures and the integration of their properties.

The purpose of this Plan is to propose further steps designed to effect compliance with the provisions of both subdivisions of Section 11(b) of the Act. Part I of the Plan

relates to the simplification of Electric's corporate structure in order to comply with the provisions of Section 11(b)(2). Part II of the Plan relates to the retention and divestment of properties to meet the provisions of Section 11(b)(1).

Part I.

Simplification of Corporate Structure

The capital stock of Electric issued and outstanding as of December 31, 1940 was as follows:

Class of Stock	Number of Shares Outstanding	Stated Value
$7 Preferred Stock, Cumulative, No Par	515,135*	$155,044,139.40
$6 Preferred Stock, Cumulative, No Par	255,430⅓	
Second Preferred Stock, Series A ($7), No Par	75,439	
Common Stock, No Par	3,452,189*	

* Including 973 shares of $7 Preferred Stock and 902 shares of Common Stock reacquired and held in Treasury.

At December 31, 1940 there were outstanding option warrants entitling the holders, without limitation as to time, to purchase 537,254 shares of Electric's Common Stock at $25 a share; in lieu of cash, each share of Second Preferred Stock, Series A ($7) surrendered with option warrants for 4 shares is, under the terms of such warrants, accepted at $100 in payment for 4 shares of Common Stock.

The $7 Preferred Stock and the $6 Preferred Stock are entitled, *pari passu*, in preference to the Second Preferred Stock, Series A, and the Common Stock to cumulative dividends at the respective rates of $7 and $6 per share per annum and in liquidation to $100 per share plus undeclared cumulative dividends. The Second Preferred Stock, Series A, subject to the rights of the holders of the $7 Preferred Stock and the $6 Preferred Stock, is entitled in preference to the Common Stock to cumulative dividends at the rate of

$7 per share per annum and in liquidation to $100 per share plus undeclared cumulative dividends.

Each share of $7 Preferred Stock, $6 Preferred Stock and Common Stock is entitled to one vote with respect to ordinary business of the corporation. The shares of Second Preferred Stock have no such vote.

Electric is included in the group of companies in which Electric Bond and Share Company is the top holding company. The preferred stocks and Common Stock of Electric (other than the holdings of Electric Bond and Share Company) are held by approximately 25,000 investors. As of December 31, 1940 Electric Bond and Share Company owned the following amounts of Electric's Capital Stock:

Class	Number of Shares	Percentage of Total Outstanding
$7 Preferred Stock	485	.09
Second Preferred Stock, Series A ($7)	13,905	18.4
Common Stock	1,976,638	57.2

In addition Electric Bond and Share Company owned option warrants for the purchase of 393,408 shares of Common Stock or 72.2% of the outstanding option warrants. There is attached as Exhibit 9 a Schedule of Investments of Electric Bond and Share Company in Electric Power & Light Corporation and its Subsidiaries as of December 31, 1940.

Arrearages on Preferred Stocks

As of December 31, 1940 the undeclared cumulative dividends on Electric's Preferred Stocks were as follows:

Class of Stock	Amount per Share	Total
$7 Preferred Stock	$56.81⅔	$29,212,970.97
$6 Preferred Stock	48.70	12,439,294.90
Second Preferred Stock, Series A ($7)	61.25	4,620,638.75
		$46,272,904.62

Subsidiary Companies

The following are subsidiary companies of Electric and are public utility companies within the meaning of the Act:

Name	State of Organization	State in which Company Operates	Nature of Business
Arkansas Power & Light Company	Arkansas	Arkansas	Electric, gas, steam heating, water, and ice; owns transportation property under lease to Capital Transportation Company (a wholly owned subsidiary)
Dallas Power & Light Company	Texas	Texas	Electric
Idaho Power Company	Maine	Idaho, Oregon, Nevada	Electric
Louisiana Power & Light Company	Florida	Louisiana	Electric, gas, water, transportation, and ice
Mississippi Power & Light Company	Florida	Mississippi	Electric, gas, and water
New Orleans Public Service Inc.	Louisiana	Louisiana	Electric, gas and transportation
United Gas Corporation	Delaware	Texas, Louisiana, Mississippi	Natural gas
Utah Power & Light Company	Maine	Utah, Idaho, Wyoming	Registered holding company; electric, and steam heating
Utah Light and Traction Company	Utah	Utah	Transportation; owns facilities for generation, transmission, and distribution of electric energy which are under lease to Utah Power & Light Company (Parent)
The Western Colorado Power Company	Colorado	Colorado	Electric

Utah Light and Traction Company and The Western Colorado Power Company, in addition to being subsidiaries of Electric, are subsidiaries of Utah Power & Light Company, a registered holding company.

Electric owns all or substantially all of the common stocks (and in some cases some preferred stocks and debt) of the above public utility subsidiaries except United Gas Corporation, Utah Light and Traction Company and The Western Colorado Power Company. Electric owns 48.5% of the Common Stock and 100% of the Second Preferred Stock of United Gas Corporation. All of the outstanding stocks, except directors' qualifying shares, of Utah Light and Traction Company and The Western Colorado Power Company are owned by Utah Power & Light Company, a subsidiary of Electric. The bonds and preferred stocks of these public utility subsidiaries are held by a large number of investors.

Electric also controls the following companies which are not public utility companies within the meaning of the Act but are engaged in the businesses respectively set forth opposite their names:

Name	State of Organization	State in which Company Operates	Nature of Business
Subsidiaries of Electric Power & Light Corporation:			
*Dallas Railway & Terminal Company	Texas	Texas	Transportation
Gentilly Development Company, Inc.	Louisiana	Louisiana	Real Estate
*Northern Texas Company	Delaware	Inactive	Owns transportation properties under lease to Dallas Railway & Terminal Company
Subsidiaries of Arkansas Power & Light Company:			
Capital Transportation Company	Delaware	Arkansas	Transportation
White River Power Company	Arkansas	Arkansas	Owns hydro site
Subsidiaries of United Gas Corporation:			
Compania Mexicana de Gas, S. A.	Mexico	Mexico	Purchase, transportation and sale at wholesale of natural gas

Name	State of Organization	State in which Company Operates	Nature of Business
Duval Texas Sulphur Company	Texas	Texas	Mining and sale of sulphur
Houston Gas Securities Company	Delaware	Inactive	Owns securities only
Union Producing Company	Delaware	Texas, Louisiana, Mississippi,	Development, production and sale at wholesale of natural gas, natural gasoline, and crude oil
United Gas Pipe Line Company	Delaware	Texas, Louisiana, Mississippi, Alabama, Florida	Purchase, gathering, transportation and sale at wholesale of natural gas; extraction and sale of natural gasoline
Houston Gulf Gas Company	Delaware	Texas	Development, production, purchase, gathering, transportation and sale at wholesale of natural gas; production and sale of crude oil
United Oil Pipe Line Company	Delaware	Louisiana, Texas, Mississippi	Gathering and transportation of crude oil

* Plan to reorganize, consolidate and simplify corporate structure of these two companies is now pending before the Commission, Docket No. 70-366.

A schedule of the principal investments of Electric in subsidiaries at December 31, 1940, is annexed as Exhibit 2.

Financial Exhibits

A corporate balance sheet of Electric and a consolidated balance sheet of Electric and its subsidiaries as of December 31, 1940, as published in its annual report to stockholders, are annexed hereto as Exhibits 3 and 4, respectively.

Statements showing the corporate income of Electric and the consolidated income of Electric and its subsidiaries for the year 1940 are annexed hereto as Exhibits 5 and 6.

There are also attached Exhibit 7 which shows the long-term debt held by the public in subsidiaries of Electric and Exhibit 8 which shows the preferred stocks held by the public in such subsidiaries, both as of December 31, 1940.

Reclassification of Capital Stock

In order to comply with Section 11(b) (2) of the Act, it is proposed that the existing classes of capital stock of Electric (including the $7 Preferred Stock, the $6 Preferred Stock, and Second Preferred Stock, Series A ($7), including arrearages, and the Common Stock) be replaced by a single class of stock with each share having identical rights as to dividends and other distributions and as to voting. It is further proposed that such new class of Capital Stock be distributed to the holders of the existing Capital Stock on such basis as shall be determined to be fair, taking into consideration existing rights, values and other relevant factors.

Various factors make it impracticable at the present time to determine what would be a fair and equitable distribution of the new capital stock among the existing classes of Capital Stock. Accordingly, the Plan as presently submitted does not propose a basis for the distribution of the new Capital Stock or determine the extent to which Electric's Second Preferred Stock and Common Stock may be entitled to receive shares of the new Capital Stock or what rights or privileges may be accorded the holders of the option warrants.

In any reorganization or reclassification of corporate structure, consideration should be given to the intrinsic values of the properties of the operating subsidiaries of Electric because it is the equity stocks of these subsidiaries which comprise Electric's principal investments. These companies are performing necessary and valuable public

service and their properties are well conceived and constructed. An engineering estimate, now in the process of preparation, of the present value of the properties of the principal operating subsidiaries of Electric, on the basis of cost of reproduction less depreciation, indicates that the value of the properties of these subsidiaries, calculated on such basis, is substantially in excess of the sum of their stated plant accounts. In addition to possessing properties of great physical value, the operating subsidiaries have shown substantial earning power under adverse business conditions in the past and they have great potential earning power for the future. In spite of the added complexities, business difficulties, and increased costs with which these subsidiaries are confronted in their present operation, the trend of their earnings now is upward. The operating subsidiaries are public utilities subject to governmental regulation and it is submitted that they are entitled to earn a reasonable return upon the fair value of their properties. Full consideration should be given to all of such factors in determining the value of the holdings of Electric and the basis for the distribution of the new Capital Stock.

In the proceedings before the Commission in connection with the Plan, adequate and complete evidence will be presented with respect to the values of the holdings of Electric in its subsidiaries and, correspondingly, to the values represented by the various classes of stock and option warrants of Electric, and such proceedings should serve to clarify questions of fact and law relative to such values.

Electric has outstanding $31,000,000 principal amount of 5% Debentures which do not mature until 2030. These Debentures will not be affected by Part I of the Plan, but may be retired in whole or in part in connection with the divestment of properties pursuant to Part II of the Plan.

Part II.

Retention and Divestment of Properties

The properties presently controlled by Electric include the following:

The Southern Electric System, including Louisiana Power & Light Company, Mississippi Power & Light Company, Arkansas Power & Light Company, New Orleans Public Service Inc., Gentilly Development Company, Inc., and certain other non-utility properties;

The United Gas System, including United Gas Corporation and its subsidiaries;

The Idaho-Utah Group, including Idaho Power Company, Utah Power & Light Company, Utah Light and Traction Company and The Western Colorado Power Company; and

Dallas Power & Light Company, Dallas Railway & Terminal Company and Northern Texas Company.

Retention of Southern Electric System

Electric hereby elects to retain its Southern Electric System as the integrated system which it is entitled to retain under Section 11(b) (1) of the Act, and also elects to retain its United Gas System, either as a part of said integrated system, or as an additional system under said Section. Under Section 11(b) (1) of the Act, the text of which is set forth in Exhibit 1 hereto, Electric may retain, subject to the approval of said Commission, "a single integrated public utility system and * * * such other businesses as are reasonably incidental or economically necessary or appropriate to the operations" of such public utility system, and may be permitted to retain such additional systems as the Commission may find (A) cannot be operated independently without the loss of substantial

economies, (B) are located in one state or in adjoining states, and (C) are not so large in combination as to impair advantages of localized management, efficient operation or effective regulation. It is submitted that the Southern Electric System and the United Gas System, which are hereinafter described, satisfy these requirements.

The Southern Electric System, which Electric hereby elects to retain as its principal system, consists of the electric utility properties of Louisiana Power & Light Company, Mississippi Power & Light Company, Arkansas Power & Light Company and New Orleans Public Service Inc., together with Gentilly Development Company, Inc., and the non-utility subsidiaries owned by Arkansas Power & Light Company.

The Southern Electric System is an integrated electric public utility system within the meaning of Section 2 (a) (29) of the Act. This System was initially created, and for nearly fifteen years has been physically operated, as an integrated coordinated electric utility system. It combines advantages of geographic, economic and climatic diversity with diversity of power supply, both as to location and as between steam and water power, and is operated as a single system in such manner as to promote maximum efficiency and economy of operation. The business of distributing and selling electric energy is under the separate control of the different companies serving their respective areas thus preserving independence of local management and effectiveness of local regulation by State authority. The engineering problems of power supply and transmission are administered jointly in the most efficient and beneficial manner for all the companies. The electric companies in this System also own and operate natural gas distribution systems, obtaining their supply of natural gas in whole or in part from the United Gas System with which they are integrated.

The properties included in the Southern Electric System are physically interconnected and are economically operated as a single interconnected and coordinated system confined in its operations to a single area or region located in adjoining states, not so large as to impair (considering the state of the art and the area and region affected) advantages of localized management, efficient operation or the effectiveness of regulation.

There would seem to be no present reasons for disposal of the non-utility companies or businesses conducted by Capital Transportation Company, White River Power Company, and Gentilly Development Company, Inc., and it is believed that those properties may properly be retained as other businesses reasonably incidental or economically necessary or appropriate to the operations of the Southern Electric System. Capital Transportation Company and White River Power Company are directly affiliated with and incidental to the business of Arkansas Power & Light Company. Gentilly Development Company, Inc. was created for the purpose of acquiring and holding certain real estate against possible future needs of Louisiana Power & Light Company or of New Orleans Public Service Inc. The growth in and about the City of New Orleans has been such that desirable sites for future construction of generating facilities have become increasingly scarce, and accordingly the continued retention of this interest is even more imperative now than when originally acquired.

Retention of United Gas System

Subject to obtaining the permission of the Commission, Electric hereby elects to retain the United Gas System, either as a part of said Southern Electric System, or as an additional system under Section 11(b) (1) of the Act.

The United Gas Corporation and its non-utility producing and pipe line subsidiaries presently constitute an in-

tegrated natural gas system within the meaning of Section 2(a) (29) of the Act. It consists of a single gas utility company as defined in the Act which, with its producing and pipe line subsidiaries, constitutes a coordinated system confined in its operation to a single area or region, not so large as to impair (considering the state of the art and the area and region affected) the advantages of localized management, efficient operation and effectiveness of regulation. The utility operations of the United Gas System are confined to the States of Texas, Louisiana and Mississippi, which States are the same as, or adjoin, the States in which the Southern Electric System operates. Furthermore, as stated above, the United Gas System supplies from its sources of production and through its pipe lines in some cases all, and in other cases a substantial portion, of the natural gas distributed by the gas utility properties owned by companies included in the Southern Electric System, and thus such gas utility properties are integrated with the United Gas System. The United Gas System is further interconnected with the Southern Electric System through the utilization of natural gas from the United Gas System in the generation of electric power at most of the steam power plants in the Southern Electric System. The United Gas System, considered as an additional system to the Southern Electric System, satisfies the requirements of Subparagraphs (A), (B) and (C) of Section 11(b) (1) of the Act.

In addition to supplying and transmitting natural gas for the utility operations of United Gas Corporation and the Southern Electric System, and as a necessary incident to such business, subsidiaries of United Gas Corporation are engaged in the production of crude oil and natural gasoline.

United Gas Corporation has formally submitted to the Commission a definitive proposal for the refinancing of its present debt. Hearings on the refinancing plan have been

conducted and substantially completed before the Commission in proceedings docketed as Nos. 70-314, 70-315, 59-21, and 4-33. Such proceedings may result in a rearrangement of the capital structure of United Gas Corporation, but the consummation of this Plan is not dependent upon the outcome of such proceedings.

Disposition of Other Holdings

It is assumed that the Commission may not permit Electric to retain its holdings in Idaho Power Company and Utah Power & Light Company, and also that the Commission may not permit Electric to retain its holdings in Dallas Power & Light Company, Dallas Railway & Terminal Company or Northern Texas Company. Electric, therefore, proposes to dispose of these holdings by sale for cash, by exchange, or by distribution to Electric's security holders, as promptly as may be practicable and consistent with the best interests of the public and Electric's security holders. The proceeds of any such disposal may be applied towards the discharge of Electric's indebtedness or may be used for other corporate purposes.

Pending the consummation of the Plan, Electric may dispose of any securities or other assets in a manner consistent with the provisions of the Act and other applicable provisions of law.

Part III.

Procedure for Carrying Out Plan

The Plan is submitted to the Securities and Exchange Commission under Section 11(e) of the Act. The Plan, as later supplemented or amended, is to be carried out under the provisions of Section 11 of the Act and other applicable provisions of law with such proceedings before the Commission and in court and such corporate proceedings as may be determined to be necessary and appropriate.

Copies of the Plan are being mailed to all holders of record of the capital stock of Electric. Upon consideration and final approval by the Commission of the Plan, including any amendments proposed and adopted, the Board of Directors will call a stockholders' meeting with the stated objective of submission of the Plan for approval and appropriate action.

With the approval of the Commission, steps to put into effect either Part I or Part II of the Plan may be taken without regard to the consummation of the other part of the Plan.

The Plan may be supplemented, amended or modified at any time in such manner as may meet with the approval of the Commission.

The Plan may be carried out by Electric or by another existing corporation or by a new corporation to be formed for such purpose. Any references herein to Electric may be deemed to include whatever corporation is utilized to carry out the Plan.

Steps taken to carry out the Plan shall be subject to approval of or action by the Securities and Exchange Commission, the Federal Power Commission and any other Federal or State regulatory body or agency to the extent required by applicable provisions of law.

The statements, opinions, computations, estimates and conclusions contained in the Introductory Statement, the Plan and the Exhibits annexed hereto are submitted by Electric solely for the purpose of assisting the Commission, the Court, the stockholders and other parties in interest in any steps or proceedings with respect to the Plan, and are not intended for the use or information of prospective purchasers of any securities, whether now existing or proposed to be issued, or for any purposes other than the purpose stated in this paragraph; and no one is authorized to make any statements regarding the Plan, whether with reference

to any securities referred to herein or otherwise, which are not set forth herein.

This Plan is submitted, and all statements herein are made, with full reservation of any rights which Electric, its subsidiaries, and its and their security holders may have under the constitutions and laws of the United States and of the various States.

By order of the Board of Directors.

ELECTRIC POWER & LIGHT CORPORATION
Joe H. Gill, President

Exhibit 1.

Text of Certain Sections of the Public Utility Holding Company Act of 1935

Section 11

"(b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

(1) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system: Provided, however, That the Commission shall permit a registered holding company to continue to control one or more additional integrated public-utility systems, if, after notice and opportunity for hearing, it finds that—

(A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;

(B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country; and

(C) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation.

The Commission may permit as reasonably incidental, or economically necessary or appropriate to the operations of one or more integrated public-utility systems the retention of an interest in any business (other than the business of a public-utility company as such) which the Commission shall find necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems.

(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding-company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the

Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company."

EXHIBIT 1.

Text to Certain Sections of the Public Utility Holding Company Act of 1935 (Continued)

Section 2(a)

"(29) 'Integrated public-utility system' means—

(A) As applied to electric utility companies, a system consisting of one or more units of generating plants and/or transmission lines and/or distributing facilities, whose utility assets, whether owned by one or more electric-utility companies, are physically interconnected or capable of physical interconnection and which under normal conditions may be economically operated as a single interconnected and coordinated system confined in its operations to a single area or region, in one or more States, not so large as to impair (considering the state of the art and the area or region affected) the advantages of localized management, efficient operation, and the effectiveness of regulation; and

(B) As applied to gas utility companies, a system consisting of one or more gas utility companies which are so located and related that substantial economies may be effectuated by being operated as a single coordinated system confined in its operations to a single area or region, in one or more States, not so large as to impair (considering the state of the art and the area or region affected) the advantages of localized management, efficient operation, and the effectiveness of regulation: Provided, That gas utility companies deriving natural gas from a common source of supply may be deemed to be included in a single area or region."

Exhibit 2.

SCHEDULE OF PRINCIPAL INVESTMENTS OF ELECTRIC POWER & LIGHT CORPORATION IN ITS SUBSIDIARIES

As of December 31, 1940

Company and Issue	No. of Shares or Principal Amount	% of Class
Arkansas Power & Light Company:		
$7 Preferred Stock	7,697	8
Common Stock	1,233,638	100
Dallas Power & Light Company:		
Common Stock	238,875	91
Dallas Railway & Terminal Company:		
(A) 7% Preferred Stock	11,000	74.1
Common Stock	30,684	94.4
Options to purchase Common Stock	1,816	--
Gentilly Development Company, Inc.:		
6% Demand Notes	$ 70,836.63	
6% Income Note Due January 1, 1940	$ 73,415.31	
Open Account	$ 49,300.00	
Capital Stock	1,478.18676	100
Idaho Power Company:		
(B) Preferred Stock (7%)	3,030	8.7
(B) Common Stock	150,000	100
Louisiana Power & Light Company:		
$6 Preferred Stock	520	.8
Second Preferred Stock ($6)	30,000	100
Common Stock	1,200,000	100
Mississippi Power & Light Company:		
6% Demand Loans	$ 190,000.00	
(A) $6 Preferred Stock	1,493	2.2
(A) $6 Second Preferred Stock	35,000	100
Common Stock	1,000,000	100
New Orleans Public Service Inc.:		
Preferred Stock ($7)	9,806	12.6
Common Stock	716,736.823	95.1
Northern Texas Company:		
6% Note dated November 25, 1935 due November 25, 1940	$1,575,000.00	
Common Stock	2,000	100
United Gas Corporation:		
(A) $7 Second Preferred Stock	884,680	100
Common Stock	3,795,086	48.5
(C) Option Warrants to purchase Common Stock	3,600,040	73.9
Utah Power & Light Company:		
(A) $7 Preferred Stock	2,100	1
Common Stock	3,000,000	100

NOTES:

(A) Dividends in arrears.

(B) Pledged with Bankers Trust Company, Trustee, as collateral security for Power Securities Corporation Collateral Trust Gold Bonds, American 6% Series, assumed by this Corporation on December 8, 1937. (These bonds were called for redemption on June 1, 1941, and pledged securities were returned to Electric Power & Light Corporation).

(C) Each option warrant give option to purchase without limitation as to time, one share

Exhibit 5.

BALANCE SHEET OF ELECTRIC POWER & LIGHT CORPORATION
As of December 31, 1940

ASSETS

*Investment Securities and Advances—Subsidiaries, Etc.		$184,538,756.88
Current Assets:		
Cash in Banks—On Demand	$ 5,790,123.01	
Special Cash Deposits	66,814.00	
Accounts Receivable	1.50	
Dividends Receivable—Associate Companies	275,171.15	
Other Current Assets	1,050.00	
Total Current Assets		6,133,159.66
Deferred Charges:		
Unamortized Debt Discount and Expense	$ 3,471,941.64	
Other	8,787.50	
Total Deferred Charges		3,480,729.14
Reacquired Capital Stock—973 shares of $7 Preferred Stock and 902 shares of Common Stock		103,109.32
TOTAL		$194,255,755.01

NOTES:

* All of the issued and outstanding common stock (150,000 shares) and 3,030 shares of preferred stock (7%) of Idaho Power Company owned by this Company, are pledged with Bankers Trust Company, Trustee, as collateral to Power Securities Corporation Collateral Trust Gold Bonds, American 6% Series, which bonds were assumed by this Company on December 8, 1937, pursuant to the plan of liquidation of Power Securities Corporation.

Investments are stated at ledger value, based on Company's valuations of securities acquired for securities issued and on cash costs, less proceeds received and other credits arising through disposal of investments included in group valuations. Losses or gains arising through the disposal of bonds and other investments included in group valuations—undeterminable in the absence of individual valuations—are included in ledger value.

There are outstanding option warrants entitling the holders, without limitation as to time, to purchase 537,254 shares of common stock at $25 a share; in lieu of cash, each share of second preferred stock, series A ($7), surrendered with option warrants for four shares will be accepted at $100 in payment for four shares of common stock.

No provision has been made in the foregoing statement for undeclared cumulative dividends amounting to $29,212,970.97 ($56.81¼ a share) on the $7 preferred stock; $13,439,294.90 ($48.70 a share) on the $6 preferred stock; and $4,620,638.75 ($61.25 a share), on the second preferred stock, series A ($7). For details see note to summary of earned surplus.

Exhibit 3.

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BALANCE SHEET OF ELECTRIC POWER & LIGHT CORPORATION
As of December 31, 1940

LIABILITIES

Capital Stock (no par value)		$155,044,139.40
Long-Term Debt:		
Gold Debentures, 5% Series, due 2030	$ 31,000,000.00	
Power Securities Corporation Collateral Trust Gold Bonds, American 6% Series, due June 1, 1949	762,625.07	
Total Long-Term Debt		31,762,625.07
Current Liabilities:		
Accounts Payable:		
Associate Companies	$ 1,439.88	
Other	13,476.92	
Accrued Interest (including $3,684.00 for which cash is in Special Cash Deposits)	654,823.75	
Accrued Taxes	55,942.66	
Other Current Liabilities:		
Power Securities Corporation Collateral Trust Gold Bonds called for redemption—including premium (cash in Special Cash Deposits)	13,130.00	
Power Securities Corporation Collateral Trust Gold Bonds callable within twelve months	109,000.00	
Miscellaneous	7,053.73	
Total Current Liabilities		854,866.94
Reserve		156,206.92
Earned Surplus		6,437,916.68
TOTAL		$194,255,755.01

Details of Capital Stock:

$7 Preferred, cumulative (entitled upon liquidation to $100 a share); pari passu with $6 Preferred and $5 Preferred; authorized, 800,000 shares; issued, 515,135 shares

$6 Preferred, cumulative (entitled upon liquidation to $100 a share); pari passu with $7 Preferred and $5 Preferred; authorized, 1,000,000 shares; outstanding (including 3½ shares of scrip), 255,430½ shares

$5 Preferred, cumulative (entitled upon liquidation to $100 a share); pari passu with $7 Preferred and $6 Preferred; authorized, 1,000,000 shares; issued, none

Second Preferred, Series A ($7), cumulative (entitled upon liquidation to $100 a share); pari passu with Second Preferred, Series AA ($7); authorized, 120,000 shares; outstanding, 75,439 shares

Second Preferred, Series AA ($7), cumulative (entitled upon liquidation to $100 a share); pari passu with Second Preferred, Series A ($7); authorized, 100,000 shares; issued, none

Common; authorized, 4,000,000 shares; issued, 3,452,189 shares

} $155,044,139.40

Exhibit 4.

CONSOLIDATED BALANCE SHEET OF ELECTRIC POWER & LIGHT CORPORATION AND SUBSIDIARIES

As of December 31, 1940.

ASSETS

PLANT, PROPERTY, AND EQUIPMENT (INCLUDING INTANGIBLES) OF SUBSIDIARY COMPANIES—		
Based on Ledger Value	$693,536,150.51	
Less net adjustment arising from the elimination of intercompany-held securities, including balance of surplus of subsidiaries at dates of acquisition, as adjusted	28,377,287.70	
BALANCE		$665,158,862.81
INVESTMENT AND FUND ACCOUNTS:		
Investments (ledger value)	$ 3,091,106.76	
Non-Current Receivables	363,873.97	
Sinking Funds	18,200.34	
Miscellaneous Special Funds	111,348.86	
TOTAL INVESTMENT AND FUND ACCOUNTS		3,584,529.93
CURRENT AND ACCRUED ASSETS:		
Cash in Banks—On Demand	$ 28,837,865.32	
Cash in Banks—Time Deposits	475,000.00	
Special Deposits:		
Matured, Called, and Currently Maturing Long-Term Debt (Including Premium) and Matured and Accrued Interest	657,993.21	
Other	622,259.07	
Working Funds	332,325.25	
Temporary Cash Investments	1,284,959.57	
Notes Receivable	437,817.91	
Accounts Receivable:		
Customers and Miscellaneous	11,030,263.19	
Associated Companies	102,190.48	
Inventories:		
Materials and Supplies	4,470,033.40	
Sulphur, Crude Oil, etc.	1,639,431.89	
Prepayments	326,449.10	
Other Current and Accrued Assets	181,496.68	
TOTAL CURRENT AND ACCRUED ASSETS		50,398,085.05
DEFERRED DEBITS:		
Unamortized Debt Discount and Expense	$ 11,640,003.15	
Property Abandoned	146,451.10	
Advances and Accounts Collectible from Production	290,128.86	
Other	444,316.26	
TOTAL DEFERRED DEBITS		12,520,899.37
REACQUIRED CAPITAL STOCK:		
Electric Power & Light Corporation—973 shares of $7 Preferred Stock and 902 shares of Common Stock	$ 103,109.33	
Subsidiaries—5,927 shares of Preferred Stocks	591,590.00	
TOTAL REACQUIRED CAPITAL STOCK		694,699.33
CONTRA ASSETS:		
Consigned Materials	$ 47,199.06	
Other	1,367.61	
TOTAL CONTRA ASSETS		48,566.67
TOTAL		$732,405,643.16

Exhibit 4.

CONSOLIDATED BALANCE SHEET OF ELECTRIC POWER & LIGHT CORPORATION AND SUBSIDIARIES

As of December 31, 1940.

LIABILITIES

Capital Stock:			
Electric Power & Light Corporation (for details see balance sheet of the Company)		$155,044,139.40	
Subsidiaries:			
Preferred Stocks 1,173,291 shares (entitled upon liquidation to $100 a share)		117,329,100.00	
Common Stocks, 4,214,338-957/1000 shares	$ 5,871,905.98		
Less Net Deficit applicable to Minority Interests	3,411,171.36	2,460,734.62	
Total Capital Stock (Less Net Deficit applicable to Minority Interests)			$274,833,974.02
Long-Term Debt:			
Electric Power & Light Corporation:			
Gold Debentures, 5% Series, due 2030	$ 31,000,000.00		
Power Securities Corporation Collateral Trust Gold Bonds, American 6% Series, due June 1, 1949	762,625.07	$ 31,762,625.07	
Subsidiaries:			
Mortgage Bonds	$190,842,560.00		
Collateral Trust Bonds	3,900,000.00		
Debentures	30,000,000.00		
Mortgage Income Bonds	4,625,380.00		
Notes Payable to Banks	5,600,000.00		
Miscellaneous	1,096,383.88	236,064,323.88	
Total Long-Term Debt			267,826,948.95
Current and Accrued Liabilities:			
Note Payable of Subsidiary—United Gas Corporation to Electric Bond and Share Company (Without Collateral)—Due on Demand		$ 25,925,000.00	
Accounts Payable:			
United Gas Corporation to Electric Bond and Share Company		2,000,000.00	
Other Associated Companies		267,600.85	
Other		2,494,469.83	
Dividends Declared (Including $324,359.93 for which Cash is in Special Deposits)		906,055.45	
Currently Maturing Long-Term Debt:			
Power Securities Corporation Collateral Trust Gold Bonds callable within twelve months		109,000.00	
Subsidiaries:			
Notes Payable to Banks		1,400,000.00	
Miscellaneous (Including $4,000.00 for which Cash is in Special Deposits)		215,252.66	
Matured Long-Term Debt (Including Premium) and Interest (Including $318,117.71 for which Cash is in Special Deposits)		341,428.86	
Preferred Stocks called for Redemption and Dividends thereon—Dissolved Subsidiaries (Cash in Special Deposits)		11,253.14	
Customers' Deposits		3,717,162.77	
Taxes Accrued		11,248,760.51	
Interest Accrued (Including $322,745.50 for which Cash is in Special Deposits)		3,936,429.10	
Other Current and Accrued Liabilities		558,543.09	
Total Current and Accrued Liabilities			53,130,956.26
Deferred Credits:			
Customers' Advances for Construction		$ 376,173.41	
Other		289,454.09	
Total Deferred Credits			665,627.50
Reserves:			
Property Retirement and Depletion		$ 68,881,452.74	
Uncollectible Accounts and Advances		931,391.71	
Inventory Adjustment (Materials and Supplies)		350,297.70	
Other		4,480,943.52	
Total Reserves			74,644,085.67
Contributions in Aid of Construction			503,003.24
Contra Liabilities:			
Consignments		$ 47,199.06	
Other		1,367.61	
Total Contra Liabilities			48,566.67
Declared Cumulative Dividends on Preferred Stocks of Subsidiaries Held by Public			18,715,627.75
Deferred Credit			13,917,368.63
Surplus:			
Earned, Less Amount Accruing to Minority Interest		$ 27,499,448.68	
Appropriated (Including Addition of $143,222.04 during 1940)		620,035.81	
Total Surplus			28,119,484.49
TOTAL			$732,405,643.18

The notes on page 18 are integral parts of the above statement and should be considered in connection therewith.

Exhibit 4.

NOTES RELATING TO CONSOLIDATED BALANCE SHEET OF ELECTRIC POWER & LIGHT CORPORATION AND SUBSIDIARIES

As of December 31, 1940

1. Plant, property, and equipment (including intangibles) are stated on the basis of cost where acquired for cash or constructed on the basis of the companies' valuations thereof at acquisition where acquired by issuance of stocks and other securities or on the basis of independent appraisal values for certain subsidiaries as of June 30, 1932, subsequently reduced in connection with intercompany transfers. The amount at which plant, property, and equipment (including intangibles) is stated does not purport to represent present realizable values or replacement cost.

2. It has been the general practice of the operating subsidiaries (except as to those subsidiaries referred to later herein) to provide for property retirements and depletion by making such provisions from current income as are considered by the management necessary to provide for retirements (including lease abandonments and dry hole costs) when they occur, rather than as calculated on the basis of estimated lives of the individual units of property or sustained depletion of gas and oil reserves, such provisions being in addition to expenditures included in operating expenses to maintain the properties in condition to render adequate service. Undeveloped leases surrendered and dry hole costs charged against property retirement and depletion reserve by gas and oil producing subsidiaries during 1940 amounted to $992,797.22 and $500,381.04, respectively. Appropriations from income for the retirement reserve by Dallas Railway & Terminal Company have been under the regulatory authority of the City of Dallas, Texas, in which the company operates, but such appropriations have been insufficient to leave any balance in the reserve for retirements of property (including property abandoned). With respect to Utah Light and Traction Company, provision for the retirement of property under lease is made by Utah Power & Light Company, lessee, and upon retirement of any such property, the actual or estimated cost thereof is charged to the lessee. provision for the renewal of motor coaches and automotive equipment is made by charges to operating expenses; the actual or estimated cost of other property retired or abandoned is charged to surplus when such retirement or abandonment is effected in the accounts.

3. Systems of accounts prescribed by regulatory authorities for public utilities provide for depreciation and depletion accounting and reclassification of plant, property, and equipment (including intangibles). Subsidiaries subject to the systems of accounts have submitted reclassifications to regulatory commissions having jurisdiction or are preparing reclassifications, but pending final disposition thereof and final determination of the extent to which such provisions may be imposed, the effect on the companies' accounts is unknown.

4. There are outstanding option warrants to purchase 537,254 shares of common stock of Electric Power & Light Corporation and 1,264,927 shares of common stock of United Gas Corporation.

5. No provision has been made in the accompanying statement for undeclared cumulative dividends of Electric Power & Light Corporation amounting to $29,212,970.97 ($56.81⅓ a share) on its $7 preferred stock; $12,439,294.90 ($48.70 a share) on its $6 preferred stock; and $4,620,638.75 ($61.25 a share) on its second preferred stock, series A ($7).

6. Certain intercompany-held securities of subsidiaries (eliminated in consolidation) have been pledged as set forth in the detailed schedules of preferred stocks and long-term debt.

7. No provision has been made in the accompanying statement for possible losses resulting from pending suits and claims against United Gas Corporation and certain of its subsidiaries (arising principally in connection with gas and oil producing properties). It is the practice of the companies to record any such losses when and as settled.

8. In March 1941, action was started against United Gas Corporation, certain of its past and present directors, and Electric Bond and Share Company, in the Supreme Court, New York County, by a holder of 150 shares of the common stock of United Gas Corporation, among other things attacking interest payments on indebtedness of United Gas Corporation owned by Electric Bond and Share Company and demanding an accounting. Counsel for United Gas Corporation are of the opinion that this action is without merit.

* Additional equity in net worth of United Gas Corporation (a subsidiary) accruing to Electric Power & Light Corporation from minority interest in common stock of United Gas Corporation, representing unearned cumulative dividends on second preferred stock of the subsidiary owned by Electric Power & Light Corporation to the extent that such dividends have priority over and reduce the equity of such common stock minority interest.

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Exhibit 5.

SCHEDULE OF INCOME OF ELECTRIC POWER & LIGHT CORPORATION

For the Twelve Months Ended December 31, 1940.

INCOME	
Gross Income:	
From Subsidiaries	$3,324,497
Other	3,285
Total	3,327,782
Expenses, including Taxes	382,036
Net Income before Interest and Other Deductions	2,945,746
Interest on Debentures	1,550,000
Interest on Collateral Trust Bonds	56,605
Amortization of Debt Discount and Expense on Debentures	38,974
Premium and Expense on Collateral Trust Bonds Retired	1,092
Total Interest and Other Deductions	1,646,671
Net Income	$1,299,075

Note:

No provision has been made for Federal excess profits tax since no excess profits are indicated.

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Exhibit 6.

STATEMENT OF CONSOLIDATED INCOME OF ELECTRIC POWER & LIGHT CORPORATION AND SUBSIDIARIES

For the Twelve Months Ended December 31, 1940

Subsidiaries	
Operating Revenues	$114,939,237
Operating Revenue Deductions:	
Operating Expenses:	
Operation	41,219,917
†Maintenance	5,724,314
*Taxes	18,912,027
Property Retirement and Depletion Reserve Appropriations	17,849,119
Total Operating Revenue Deductions	83,705,377
Net Operating Revenues	31,233,860
Other Income	410,786
Other Income Deductions, including Taxes	119,131
Other Income (net)	291,655
Gross Income	31,525,515
Interest on Long-Term Debt	11,853,359
Other Interest (notes, loans, etc.)	2,028,004
Other Deductions	1,125,528
Total Interest to Public and Other Deductions	15,006,891
Less Interest charged to Construction	38,315
Net Interest to Public and Other Deductions	14,968,576
Balance	16,556,939
Preferred Dividends to Public (full dividend requirements applicable to period whether earned or unearned)	7,886,452
Balance	8,670,487
Portion applicable to Minority Interests (based upon holdings by the public of common stocks of subsidiaries at end of period)	381,878
Net Equity of Electric Power & Light Corporation in Income of Subsidiaries	$ 8,288,609
Electric Power & Light Corporation	
Net Equity of Electric Power & Light Corporation in Income of Subsidiaries (as shown above)	$ 8,288,609
Other Income	3,285
Total	8,291,894
Expenses, including Taxes	382,036
Balance before Interest and Other Deductions	7,909,858
Interest and Other Deductions	1,646,671
Balance carried to Consolidated Earned Surplus	$ 6,263,187

Notes:

† Does not include maintenance incurred in the production of crude oil, gasoline, and sulphur. Such maintenance, together with all other costs, is transferred to inventory and subsequently, upon sale, is included in cost of product sold in the current period.

* Includes provision of $184,666.92 for Federal excess profits tax.

All intercompany transactions have been eliminated from the above statement. Interest and preferred dividend deductions of subsidiaries represent full requirements for the period (whether paid or not paid) on securities held by the public and give no effect to preferred stock dividend arrearages for prior periods. The "Portion applicable to Minority Interests" is the calculated portion of the balance of income applicable to minority holdings by the public of common stocks of subsidiaries. Minority interests have not been charged with deficits where income accounts of subsidiaries have so resulted. The "Net Equity of Electric Power & Light Corporation in Income of Subsidiaries" includes interest and preferred dividends paid or earned on securities held, plus the proportion of earnings which accrued to common stocks held by Electric Power & Light Corporation, less losses where income accounts of individual subsidiaries have resulted in deficits for the period.

Consolidated balance sheet notes 2, 3, and 7 are integral parts of this statement and should be considered in connection therewith.

Exhibit 7.

SCHEDULE OF LONG-TERM DEBT HELD BY PUBLIC IN SUBSIDIARIES OF ELECTRIC POWER & LIGHT CORPORATION

As of December 31, 1940.

Name of Issuer and Title of Issue	Date of Maturity	Outstanding	Held in Treasury	Held Intercompany	Held by Public
Mortgage Bonds:					
Arkansas Power & Light Company:					
First and Refunding Mortgage Gold Bonds, 5% Series Due 1956	10/ 1/56	$35,000,000.00	.....	.....	$ 35,000,000.00
First and Refunding Mortgage Gold Bonds, 2.75% Series Due 1959	7/ 1/59	200,000.00	.....	.....	200,000.00
First and Refunding Mortgage Gold Bonds, 2.88% Series Due 1956	10/ 1/56	310,000.00	.....	.....	310,000.00
Dallas Power & Light Company:					
First Mortgage Bonds, 3½% Series Due 1967	2/ 1/67	16,000,000.00	.....	.....	16,000,000.00
Dallas Railway & Terminal Company:					
First Mortgage Gold Bonds, 6% Series Due 1951	7/ 1/51	4,703,000.00	.....	.....	4,703,000.00
Idaho Power Company:					
First Mortgage Bonds, 3¼% Series Due 1967	10/ 1/67	18,000,000.00	.....	.....	18,000,000.00
Louisiana Power & Light Company:					
First Mortgage Gold Bonds, 5% Series, Due 1957	12/ 1/57	17,500,000.00	.....	.....	17,500,000.00
Mississippi Power & Light Company:					
First Mortgage Gold Bonds, 5% Series, Due 1957	12/ 1/57	16,000,000.00	.....	.....	16,000,000.00
New Orleans Public Service Inc.:					
First and Refunding Mortgage Gold Bonds, Series A, 5%	10/ 1/52	11,872,500.00	.....	.....	11,872,500.00
First and Refunding Mortgage Gold Bonds, Series B, 5%	6/ 1/55	17,672,000.00	.....	.....	17,872,000.00
General Lien Four and One-Half Per Cent. Gold Bonds, Due July 1, 1935 (10% Paid)—Maturity extended, with interest at 5%	7/ 1/42	1,843,560.00	.....	.....	1,843,560.00
†New Orleans City Railroad Company—General Mortgage 4—5 Per Cent. Gold Bonds	7/ 1/43	3,164,000.00	.....	.....	3,164,000.00
†New Orleans City and Lake Railroad Company—Consolidated First Mortgage Fifty Year Five Per Cent. Gold Bonds	1/ 1/43	1,663,000.00	.....	.....	1,663,000.00
†New Orleans Power House Company, Limited—First Mortgage Forty-Two Year Five Per Cent. Power House Gold Bonds	7/ 1/43	200,000.00	.....	.....	200,000.00
†Canal & Claiborne Railroad Company—Six Per Cent. Fifty-Years Gold Mortgage Bonds	5/ 1/46	441,500.00	.....	.....	441,500.00
†Saint Charles Street Railroad Company—First Mortgage Four Per Cent. Fifty Year Gold Bonds	1/ 1/52	283,000.00	.....	.....	283,000.00
Utah Light and Traction Company:					
**Thirty-Year First and Refunding Mortgage Gold Bonds Series A, 5%	10/ 1/44	12,535,300.00	$ 352,300.00	.....	12,183,000.00
Utah Power & Light Company:					
Thirty-Year First Mortgage Five Per Cent. Gold Bonds	2/ 1/44	33,607,000.00	a4,234,000.00	.....	29,373,000.00
"First Lien and General Mortgage Gold Bonds, Series of "4½s due 1944"	2/ 1/44	4,234,000.00	.....	.....	4,234,000.00
The Western Colorado Power Company:					
5% First Mortgage Gold Bonds	Due On Demand	3,884,000.00	.....	a$3,884,000.00	.....
Total Mortgage Bonds					190,842,560.00
Collateral Trust Bonds:					
Houston Gas Securities Company:					
5% Collateral Trust Gold Bonds	3/ 1/52	3,900,000.00	.....	.....	3,900,000.00
Total Mortgage and Collateral Trust Bonds Forward					$194,742,560.00

Exhibit 7.

SCHEDULE OF LONG-TERM DEBT HELD BY PUBLIC IN SUBSIDIARIES OF ELECTRIC POWER & LIGHT CORPORATION

As of December 31, 1940.

(Continued)

Name of Issuer and Title of Issue	Date of Maturity	Outstanding	Held in Treasury	Held Intercompany	Held by Public
TOTAL MORTGAGE AND COLLATERAL TRUST BONDS FORWARD					$194,742,500.00
DEBENTURES:					
United Gas Corporation:					
†United Gas Public Service Company 6% Debentures	7/ 1/53	$55,150,000.00	$26,300,000.00	c$3,850,000.00	25,000,000.00
†United Gas Public Service Company Twenty-Year 6% Gold Debentures	3/ 1/52	4,587,000.00	2,000.00	c 4,585,000.00	—
Utah Power & Light Company:					
Six Per Cent. Gold Debenture Bonds, Series A	5/ 1/2022	5,000,000.00	.....	.....	5,000,000.00
TOTAL DEBENTURES					30,000,000.00
MORTGAGE INCOME BONDS:					
New Orleans Public Service Inc.:					
Six Per Cent. Mortgage Gold Income Bonds, Series A	11/ 1/49	4,624,700.00	.....	.....	4,624,700.00
Six Per Cent. Mortgage Gold Income Bonds, Series B	11/ 1/49	680.00	.....	.....	680.00
TOTAL MORTGAGE INCOME BONDS					4,625,380.00
NOTES PAYABLE TO BANKS:					
Houston Gulf Gas Company:					
2½% Five Year Note, dated August 29, 1940, payable $600,000 semiannually	8/29/45	6,000,000.00	.....	.....	6,000,000.00
United Gas Pipe Line Company:					
2% Five Year Note, dated December 30, 1940, payable $100,000 semiannually	12/30/45	1,000,000.00	.....	.....	1,000,000.00
TOTAL NOTES PAYABLE TO BANKS					7,000,000.00
Less Currently Maturing (included among Current Liabilities)					1,400,000.00
BALANCE—NOTES PAYABLE TO BANKS					5,600,000.00
MISCELLANEOUS:					
Arkansas Power & Light Company	Various	35,176.00	.....	.....	50
Capital Transportation Company	Serially to 9/1/50	20,036.80	.....	.....	20,036.80
Louisiana Power & Light Company	Various	113,538.85	.....	.....	113,538.85
Mississippi Power & Light Company	Various	291,237.75	.....	.....	291,237.75
***Utah Light and Traction Company	Annually 1943 to 1962	261,114.82	.....	.....	261,114.82
United Gas Pipe Line Company	Various	302,708.46	.....	.....	302,708.46
United Oil Pipe Line Company	$1,600.00 Semiannually	3,200.00	.....	.....	3,200.00
Union Producing Company	Various	284,623.86	.....	.....	284,673.86
TOTAL MISCELLANEOUS					1,[illegible]
Less Currently Maturing (included among Current Liabilities)					25,[illegible]
BALANCE—MISCELLANEOUS					1,096,301.80
TOTAL LONG-TERM DEBT OF SUBSIDIARIES PER CONSOLIDATED BALANCE SHEET					$236,064,327.80

NOTES:

In addition to issues held by the public, the above schedule includes certain issues in which no public holding exists, but in which intercompany holdings are pledged as indicated.

† Assumed by company under which listed.

c Interest was payable at the rate of 4% up to and including July 1, 1903.

** Payment of principal of and interest on bonds held by public guaranteed by Utah Power & Light Company.

*** Payment of principal and interest guaranteed by Utah Power & Light Company.

A Pledged as collateral to Utah Power & Light Company First Lien and General Mortgage Gold Bonds, Series of "4½s due 1944".

B Pledged, together with 34,991 shares of capital stock of The Western Colorado Power Company, as collateral to Utah Power & Light Company Thirty-Year First Mortgage Five Per Cent. Gold Bonds.

C Pledged as collateral to Houston Gas Securities Company 5% Collateral Trust Gold Bonds.

Exhibit 8.

SCHEDULE OF PREFERRED STOCKS HELD BY PUBLIC IN SUBSIDIARIES OF ELECTRIC POWER & LIGHT CORPORATION

As of December 31, 1940

Name of Issuer and Title of Issue	Issued	Held Intercompany	Held in Treasury and Reacquired	Held by Public
Arkansas Power & Light Company:				
$7 Preferred—Cumulative—No Par Value	96,131	7,697	216	88,218
$6 Preferred—Cumulative—No Par Value	50,000	.....	3,690	46,310
Dallas Power & Light Company:				
7% Preferred—Cumulative—$100 Par Value	35,000	.....	.....	35,000
$6 Preferred—Cumulative—No Par Value	43,731	.....	.....	43,731
Dallas Railway & Terminal Company:				
7% Preferred—Cumulative—$100 Par Value	15,000	11,000	157	3,843
Idaho Power Company:				
Preferred (7%)—Cumulative—$100 Par Value	38,010	3,030*	3,210	31,770
$6 Preferred—Cumulative—No Par Value	30,000	.....	1,543	28,457
Louisiana Power & Light Company:				
$6 Preferred—Cumulative—No Par Value	60,000	520	578	58,902
Mississippi Power & Light Company:				
$6 Preferred—Cumulative—No Par Value	69,000	1,493	1,732	65,775
New Orleans Public Service Inc.:				
Preferred ($7)—Cumulative—No Par Value	77,798	9,806	.....	67,992
United Gas Corporation:				
$7 Preferred—Cumulative—No Par Value	449,822	.....	.....	449,822
Houston Gulf Gas Company:				
7% Preferred, Series A—Cumulative—$100 Par Value	10,000	7,952	1,940	108
7% Preferred, Series B—Cumulative—$100 Par Value	15,000	14,990	.....	10
Utah Power & Light Company:				
$6 Preferred—Cumulative—No Par Value	41,921	.....	.....	41,921
$7 Preferred—Cumulative—No Par Value	207,605	2,100	.....	205,505
TOTAL	1,239,018	58,588	13,066	1,167,364

NOTE:

* Pledged, together with 150,000 shares of common stock of Idaho Power Company, with Bankers Trust Company, Trustee, as collateral to Power Securities Corporation Collateral Trust Gold Bonds, American 6% Series. (These bonds were called for redemption on June 1, 1941 and pledged securities were returned to Electric Power & Light Corporation).

Exhibit 9.

SCHEDULE OF INVESTMENTS OF ELECTRIC BOND AND SHARE COMPANY IN ELECTRIC POWER & LIGHT CORPORATION AND SUBSIDIARIES

As of December 31, 1940

Company and Issue	Number of Shares or Principal Amount	Percent of Total Outstand
Electric Power & Light Corporation:		
$7 Preferred Stock	485 Shs.	.09
Second Preferred Stock, Series A ($7)	13,905 Shs.	18.43
Common Stock	1,976,638 Shs.	57.27
Option Warrants to Purchase Common Stock	393,408 Shs.	72.23
Arkansas Power & Light Company:		
First and Refunding Mortgage Gold Bonds, 5% Series	$915,000.00	2.61
Louisiana Power & Light Company:		
First Mortgage Gold Bonds, 5% Series	$377,000.00	2.15
Mississippi Power & Light Company:		
First Mortgage Gold Bonds, 5% Series	$431,000.00	2.69
New Orleans Public Service Inc.:		
First and Refunding Mortgage Gold Bonds, Series A, 5%	$397,000.00	3.34
First and Refunding Mortgage Gold Bonds, Series B, 5%	$503,000.00	2.81
Utah Power & Light Company:		
Thirty-Year First Mortgage Five Per Cent. Gold Bonds	$300,000.00	1.02
United Gas Corporation:		
$7 Preferred Stock	17,310 Shs.	3.85
Common Stock	752,666 Shs.	9.63
Option Warrants to Purchase Common Stock	151,005 Shs.	3.10
United Gas Public Service Company, 6% Debentures	$25,000,000.00	86.65
6% Note, due on demand	$25,925,000.00	100.00
Account Payable	$2,000,000.00	100.00
Houston Gas Securities Company:		
5% Collateral Trust Gold Bonds	$440,000.00	11.28

EXHIBIT II.

RESOLUTIONS

Resolutions of the Board of Directors of the Company authorizing the execution and filing of this Application and any and all amendments thereto.

This certifies that this is a true and complete copy of resolutions passed at a meeting of the Board of Directors of Electric Power & Light Corporation, held at 2 Rector Street, New York, N. Y., on November 28, 1941, at which a majority of such directors was present and voting throughout:

"RESOLVED that the officers of the Company be, and they hereby are, authorized and directed to execute, verify and file with the Securities and Exchange Commission an Application pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935, with amendment or amendments thereto, as prescribed by the Securities and Exchange Commission pursuant to said Act, with any and all exhibits necessary or appropriate thereto; and further

RESOLVED that the officers of the Company be, and they hereby are authorized and directed to take such other and further steps as in their opinion, and in the opinion of counsel for the Company, may be necessary or appropriate in aid and furtherance of the matters acted upon by the Board of Directors of this Company at this meeting as set forth in general in the resolutions adopted at this meeting."

The above resolutions have not been modified, altered or rescinded and remain in full force and effect.

WITNESS my hand and the seal of said Company this 3rd day of December, 1941.

(SEAL) E. H. DIXON, Secretary.

EXHIBIT III.

Electric Power & Light Corporation
Two Rector Street, New York

December 4, 1941.

To the Holders of Capital Stock of Electric Power & Light Corporation:

A Plan dated as of November 28, 1941, for compliance with Sections 11(b)(1) and 11(b)(2) of the Public Utility Holding Company Act of 1935 has been adopted by the Board of Directors of Electric Power & Light Corporation and is being submitted to the Securities and Exchange Commission under the provisions of such Act. A copy of the Plan is enclosed herewith for your information. No action on the part of stockholders is required at the present time.

It is the opinion of the Board of Directors that the Plan is in the interests of the Company and its security holders and constitutes a major step in the solution of the problems affecting Electric Power & Light Corporation under the Public Utility Holding Company Act.

Respectfully submitted.

By order of the Board of Directors,

JOE H. GILL, President.

[DOCUMENT No. 90.]

In the Matter of
Electric Bond and Share Company et al., Respondents.
File No. 59-12

STIPULATION *Re*
AMERICAN POWER & LIGHT COMPANY.

[Filed at Hearing August 22, 1942.]

Counsel for the Public Utilities Division and for respondent, American Power & Light Company (American) having

heretofore stipulated on the record that they have no further evidence to present concerning said respondent and that as to it the record may be deemed closed;

And a copy of Commission's proposed findings, opinion and order having been exhibited to counsel for American;

And it appearing therefrom that the objections made by respondent American in motions and exceptions, or otherwise in the record, have been fully presented to and urged before the Commission, and are ruled upon in said findings, opinion and order;

It is hereby stipulated that respondent American through its counsel hereby waives the filing of request for findings, further exceptions to the findings and opinion of the Commission, the filing of briefs and oral argument, but reserves all legal and constitutional rights, including its right to full judicial review of the said findings, opinion and order.

Subject to the foregoing reservations of rights, it is stipulated that the Commission may proceed to enter its findings, opinion and order without further formality.

ALFRED BERMAN,
Counsel for PUBLIC UTILITIES DIVISION.

SIMPSON, THACHER & BARTLETT,
by JOHN F. MACLANE.

REID & PRIEST,
by FRANK A. REID,
Counsel for AMERICAN POWER & LIGHT COMPANY.

Date: August 21, 1942.

For original see Comm. Exhibit No. 1070.

[Document No. 91.]

In the Matter of
Electric Bond and Share Company, et al., Respondents.
File No. 59-12

STIPULATION *Re*
ELECTRIC POWER & LIGHT CORPORATION.

[Filed at Hearing August 22, 1942.]

Counsel for the Public Utilities Division and for respondent, Electric Power & Light Corporation (Electric) stipulated that they have no further evidence to present concerning said respondent and that as to it the record may be closed;

And a copy of Commission's proposed findings, opinion and order having been exhibited to counsel for Electric;

And it appearing therefrom that the objections made by respondent Electric in motions and exceptions or otherwise in the record have been fully presented to and urged before the Commission, and are ruled upon in said findings, opinion and order;

It is hereby stipulated that respondent Electric through its counsel hereby waives the filing of request for findings, further exceptions to the findings and opinion of the Commission, the filing of briefs and oral argument, but reserves all legal and constitutional rights, including its right to full judicial review of said findings, opinion and order.

Subject to the foregoing reservations of rights, it is stipulated that the Commission may proceed to enter its findings, opinion and order without further formality.

ALFRED BERMAN,
Counsel for Public Utilities Division.

SIMPSON, THACHER & BARTLETT,
by John F. MacLane,

REID & PRIEST,
by FRANK A. REID,
WRIGHT, GORDON, ZACHRY, PARLIN & CAHILL,
by DANIEL JAMES,
Counsel for ELECTRIC POWER & LIGHT CORPORATION.

Date: August 21, 1942

For original see Commission Exhibit No. 1071.

[DOCUMENT No. 92.]

SECURITIES AND EXCHANGE COMMISSION
Philadelphia.

In the Matter of
Electric Bond and Share Company,
American Power & Light Company,
Pacific Power & Light Company,
Electric Power & Light Corporation,
Utah Power & Light Company,
National Power & Light Company,
Ebasco Services Incorporated,
Respondents

File No. 59-12

Public Utility Holding Company Act
of 1935—Section 11(b)(2)

FINDINGS AND OPINION OF THE COMMISSION.

[August 31, 1942.]

Simplification of Holding Company System
Undue and Unnecessary Complexity
Unfair and Inequitable Distribution of Voting Power
Action Required To Be Taken

Where subholding companies constitute the central tier in a holding company system and enable

the top holding company through ownership of a minority of their voting securities to control the entire system with disproportionately small investment, held that the corporate structure and continued existence of such subholding companies unfairly and inequitably distribute voting power among security holders of the system within the meaning of Section 11(b)(2).

Where subholding companies serve no economic purpose and perform no useful function with respect to their subsidiary companies or their investors and contribute to producing within a holding company system the vices of a pyramided structure, *held* that the continued existence of such subholding companies unduly and unnecessarily complicates the structure of the holding company system.

Where the continued existence and corporate structures of subholding companies unfairly and inequitably distribute voting power among security holders of a holding company system and unduly and unnecessarily complicate the structure of such system, held, under the facts and circumstances shown in the record that the dissolution of such companies is necessary to ensure compliance with the requirements of Section 11(b)(2).

Where plans are filed under Section 11(e) of the Act purportedly to bring subholding companies into compliance with Section 11 of the Act, but where such plans on their face are lacking in elements essential to to constitute true plans, and for other reasons fail to afford assurance of prompt and effective conformance to the provisions of Section 11, held that the filing of such 11(e) plans does not constitute a bar to the entry by the Com-

mission of an order of dissolution of the subholding companies which on the existing state of facts has been found necessary.

Appearances

MILTON H. COHEN, ALFRED BERMAN, and GEORGE L. RODGERS, Jr., for the Public Utilities Division of the Commission.

SIMPSON, THACHER & BARTLETT by JOHN F. MACLANE, IRA A. HAWKINS, Jr., DOUGLAS A. CALKINS, and GUNNAR FROMEN; and REID AND PRIEST by FRANK A. REID, for the respondents.

I. Present Status of the Proceeding

The present proceeding was instituted by us on May 9, 1940 under Section 11(b)(2) of the Public Utility Holding Company Act of 1935 against Electric Bond and Share Company ("Bond and Share"), American Power & Light Company ("American"), Electric Power & Light Corporation ("Electric"), National Power & Light Company ("National"), American & Foreign Power Company, Inc., Pacific Power & Light Company, Utah Power & Light Company, and Ebasco Services Incorporated. Our Notice and Order for Hearing *1/* states that on the basis of the detailed allegations recited therein we have reasonable grounds to believe that: (1) the structure of the holding company system of Bond and Share is unduly and unnecessarily complicated; (2) voting power is unfairly and inequitably distributed among security holders of the holding company system of Bond and Share; (3) Bond and Share is a holding company with respect to certain subsidiary companies which themselves have subsidiary companies which are holding companies. A hearing was ordered by us to be held for the purpose of determining *inter alia:* "whether it is necessary to

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1/ Holding Company Act Release No. 2051.

discontinue the existence of, or modify the corporate structure of, or redistribute the voting power among security holders of, said Electric Bond and Share Company or any of the other respondents."

By subsequent Order, dated June 7, 1940, *2/* we specified that the hearing should be confined initially to the sole issue of whether it is necessary to discontinue the existence of American, Electric, National, and American & Foreign Power Company, Inc., or any of them, in order to ensure that the structure of the holding company system of Bond and Share shall not be unduly or unnecessarily complicated and that voting power shall not be unfairly or inequitably distributed among the security holders in that system. */3*

The hearing was duly convened on June 18, 1940 and was held intermittently until July 22, 1942, at which time it was indefinitely continued subject to further order of the Commission. A voluminous record comprising more than 18,000 pages of testimony and more than 1500 exhibits has been assembled and is now before us. *4/*

In August 1941, although cross-examination of all Respondents' witnesses had not been completed, Counsel for

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2/ See Holding Company Act Release No. 2099 (7 S.E.C. 391).

3/ American & Foreign Power Company, Inc. was dismissed as a party to the proceeding by our Order dated June 17, 1940, such dismissal being without prejudice to any future appropriate proceedings under Section 11 (b) (2) or any other section of the Public Utility Holding Company Act of 1935. (Holding Company Act Release No. 2099.)

4/ During the progress of the hearing various motions relating to matters of procedure or the admissibility of evidence were presented to us by Counsel for the Public Utilities Division and Counsel for the Respondents. After hearing oral argument and examining the briefs submitted by Conusel, we issued interim orders respecting the questions presented. See Holding Company Act Releases No. 2196 (7 S.E.C. 881) and 2940 (9 S.E.C. 917). The various procedural and evidentiary questions which arose during the course of the hearing are described in detail in Holding Company Act Release No. 2962 (9 S.E.C. 978).

the Public Utilities Division and Counsel for the Respondents stipulated on the record that neither side desired to adduce further evidence with respect to Respondent National and that, as to it, the record might be deemed closed, and that the Commission might proceed to make its findings and enter its opinion and order upon such record. Pursuant to such stipulation, on August 23, 1941, we issued our Findings and Opinion answering in the affirmative the issue posed in our Order of June 7, 1940 so far as National was concerned.

Having found on the basis of our detailed "Findings and Opinion" that it was necessary to discontinue National's existence, we entered our Order requiring that effective steps be taken to such end. 5/

In making our findings with respect to the issue as it bore on National, we stated that:

> "We leave for fuure determination this same issue as regards American Power & Light Company and Electric Power & Light Corporation. Neither do we at this time decide the other issues stated in our Notice of and Order for Hearing dated May 9, 1940, as to which we previously reserved our jurisdiction in our Order of June 7, 1940, and which reservation of jurisdiction is hereby expressly reaffirmed."

Subsequent to the entry of the Findings and Opinion and Order as to National, the hearing was resumed and additional evidence presented as to the other Respondents. Counsel for the Public Utilities Division and for the Respondents have now stipulated on the record that they have no further evidence to present concerning Respondents American and Electric and that, as to them, the record may be deemed closed and the Commission may proceed to make its findings and enter its opinion and order upon such record. Counsel have also stipulated, as in the case of National, that they

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5/ Holding Company Act Release No. 2962 (9 S.E.C. 978).

have waived a trial examiner's report, and any right to submit to us proposed findings or to be heard further by us through oral argument or brief. However, the objections made by the Respondents in motions and exceptions have been urged before the Commission and are ruled upon below, and the stipulation of counsel recites that Respondents do not acquiesce in the present findings and conclusion or in the order to be entered hereon, and that they expressly reserve all legal and constitutional rights.

Accordingly, the question presently before us for appropriate disposition is whether the existence of American and Electric, like that of National, must be discontinued "in order to ensure that the structure of the holding company system of Electric Bond and Share Company shall not be unduly or unnecessarily complicated and that voting power shall not be unfairly or inequitably distributed among security holders of such system." The other issues stated in our Notice of and Order for Hearing, dated May 9, 1940, are not presented to us at this time, and as to them, our reservation of jurisdiction continues in effect. *6/*

6/ These reserved issues, as stated in our Notice and Order of May 9, 1940 (Holding Company Act Release No. 2051) include the following:

1. Whether it is necessary to discontinue the existence of, or modify the corporate structure of, or redistribute the voting power among security holders of Electric Bond and Share Company or any of the other Respondents.

2. What further action, if any, is necessary and shall be required to be taken by Respondents, or any of them, in order that each of the Respondents which is a registered holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company.

3. What further action, if any, is necessary and shall be required to be taken by the Respondents, or any of them to ensure that the corporate structure or continued existence of any of the Respondents does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of the holding company system of Electric Bond and Share Company.

II. Pending Motions and Exceptions

Prior to putting in the Respondents' case and again at the conclusion of the hearing, their counsel made a motion to dismiss the Commission's Notice of and Order for Hearing and the proceeding itself on the following grounds: (1) that Section 11(b)(2) of the Act is unconstitutional; (2) that the Commission was without power to proceed with the hearing in this proceeding, except after the completion of, or auxiliary to, or in conjunction with, its proceeding under Section 11(b)(1) of the Act; (3) that as a preliminary to the determination of any of the questions involved in this proceeding the status of American Gas and Electric Company and its subsidiaries with respect to Bond and Share and its system must be determined upon said company's application under Section 2(a)(8) of the Act; (4) that the Notice and Order is defective for want of necessary parties in that subsidiary companies and security holders of the Respondents were not made parties; (5) that the allegations of the Notice and Order were vague and uncertain in that they lacked proper specification; (6) that the Commission has not made the examination and investigation contemplated by Section 11(a); and finally (7) that the evidence offered by Counsel for the Public Utilities Division failed "to establish the issues tendered by the Commission's Order of June 6, 1940".

Respondents' motion is hereby overruled; the various contentions being answered *seratim* as follows:

As to (1), we have several times ruled that the issue of constitutionality of the statutes we are charged with administering is not for us. 7/

As to (2), we have considered and rejected a similar contention in The Commonwealth & Southern Corporation (Holding Company Act Release No. 3432).

7/ *The North American Company*, Holding Company Act Release No. 3405, and decisions cited therein.

As to (3), while we deem it without merit, the point is moot in that we have already issued our Order denying American Gas and Electric Company's application to be declared not a subsidiary of Bond and Share. *8/*

As to (4), we have considered and rejected a similar contention in Northern New England Company, Holding Company Act Release No. 2464 (8 S. E..C. 419), International Utilities Corporation (Holding Company Act Release No. 3047), and The Commonwealth & Southern Corporation (Holding Company Act Release No. 3432).

As to (5), we find the point groundless, particularly in light of the admissions made by Respondents' Counsel in brief and argument on an earlier motion, *9/* and our ruling on the procedural questions heretofore submitted. *10/*

8/ Holding Company Act Release No. 2749 (9 S.E.C. 247).

9/ For example, at page 16 of the brief filed by Respondents on June 22, 1940, in support of a procedural motion, Respondents' Counsel stated:

"We further concede, likewise for the purpose of the present motion only, that the oral statement made by Commission's Counsel at R. pp. 173 to 180, inclusive, if confirmed by the Commission, might constitute a sufficient bill of particulars 'to inaugurate a definitive hearing upon the matters embraced in the statement; in other words, remedy any defect of indefiniteness and uncertainty in the Notice'."

Subsequent to the making of the above admission, Counsel for the Public Utilities Division served on Respondents' Counsel a 27 page statement setting forth in detail the contentions of Commission's Counsel and the relations of each portion of every exhibit to such contentions. With respect thereto we stated:

"But whatever may have been the situation when this motion was noticed, the supplemental written statement filed by Counsel for the Public Utilities Division, insofar as it relates each fact claimed to have been established to the specific exhibits or portions of exhibits relied upon, is, in our opinion, entirely adequate to apprise Respondents both of the contentions of Counsel for the Public Utilities Division and the evidence offered in support of each contention." (Holding Company Act Release No. 2196 [7 S.E.C. 881]).

10/ Holding Company Act Release No. 2196 (7 S.E.C. 881).

As to (6), without conceding the right of Respondents to raise the point, the fact is, as recited in our Notice of and Order for Hearing, that we did make examination pursuant to the statutory requirement. *11/*

Finally as to (7), although we do not think the contention had merit even at the time made, it is obvious, as the facts set forth in our Findings establish, that it is devoid of all foundation at present in light of the large amount of additional relevant evidence subsequently adduced by Counsel for the Public Utilities Division during cross-examination and rebuttal. *12/*

In addition to the motion to dismiss, Counsel for Respondents also filed a voluminous "statement on objections to exhibits and parts of exhibits" in which they moved to strike, in whole or in part, various of the exhibits introduced in evidence by Counsel for the Public Utilities Division. We have already ruled with respect to these exhibits that, in light of the detailed statement served on Respondents' Counsel by Counsel for the Division, adequate specification has been made as to the portion of each exhibit relied on and its bearing on the contentions of Counsel for the Division as related to the issues in the proceeding. The motion to strike these exhibits is based on grounds of relevance, competence, and unnecessary cumulativeness. The exhibits in question are generally very similar to those which we recently had occasion to describe and discuss in our Opinion in *The United Corporation. 13/* We held there that the data was

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11/ Holding Company Act Release No. 2051.

12/ In an administrative proceeding of the kind we are here dealing with, a motion to dismiss for insufficiency made by a Respondent at the close of Commission Counsel's case will not be determined until conclusion of the entire proceeding before the trial examiner, and will then be determined on the basis of the entire record. *Cf. Charles C. Wright, et al.* (1 S.E.C. 901).

13/ Holding Company Act Release No. 3592, pp. 6-13.

relevant to the issues and competent; and that it was not cumulative "since it may be as important to show the static quality or constancy of certain financial characteristics, as it is to demonstrate variability from year to year". The same ruling is applicable to the material which Respondents have here moved to strike, and such motion accordingly will be denied.

Counsel for the Respondents and for the Public Utilities Division have noted numerous exceptions with respect to rulings of the examiner admitting evidence. While undoubtedly considerable data was admitted in evidence which was of somewhat remote relevance, nothing has come to our attention which constitutes prejudicial error.

In addition, Counsel for American made certain formal offers of proof with respect to evidence bearing on valuation of assets relating primarily to merits of a certain Section 11(e) plan filed by American, discussed below. These offers of proof were rejected by the examiner on motion of Counsel for the Division, and exceptions noted by Respondents. In light of our ruling in *The Commonwealth & Southern Corporation, 14/* as to the inadmissibility of valuation testimony in an 11(b) (2) proceeding of this kind, and our discussion hereinafter set forth respecting the 11(e) Plan, *15/* we find the proffered evidence was properly denied admission.

On July 23, 1941, American, and on December 4, 1941, Electric, each filed with us a document entitled "Application Under Section 11(e) of Public Utility Holding Company Act of 1935. . . . For Approval of Plan to Enable . . . Company to Comply with Subsection (b) of Section 11 of said Act." These documents are referred to herein as the "11(e) Plans".

14/ Holding Company Act Release No. 2831 (9 S.E.C. 609).

15/ See Section VI of this Findings and Opinion.

After the filing of these documents, Counsel for both companies made a motion to consolidate the 11(e) Plans with the present proceeding, which motion is still pending.

The nature and contents of American and Electric's 11(e) Plans will be discussed at a later point in this opinion. *16/* For present purposes, it is sufficient to state that these plans were filed at a time when the record in the present proceeding was nearing completion. It appears that if consolidation were granted, the result would be to inject into the present proceeding issues of fact and law in many respects different from, and unrelated to, those here involved. In consequence, no useful purpose would be served by permitting the consolidation of the 11(e) Plans with the present proceeding, but on the contrary, delay and confusion would inevitably result. Accordingly, the motion for consolidation will be denied.

In seeking to resolve the ultimate issue now posed before us, our consideration has followed three principal avenues of inquiry, namely: (1) whether the structure of the holding company system of Bond and Share is unduly and unnecessarily complicated, or voting power unfairly and inequitably distributed among security holders of such system; (2) if so, whether such conditions are to a substantial extent attributable to the continued existence or capital structures of American and Electric or either of them; and (3) whether it is necessary to discontinue the existence of American and Electric or either of them in order to remedy these conditions in the manner contemplated by the statute.

With reference to these problems, the record of the present proceeding contains extraordinarily complete and detailed evidence respecting the development of the Bond and Share system and the historical and functional relations of the component parts of the system to one another.

16/ Section VI, *infra*.

Evidence on these subjects had been initially introduced upon the insistence of the Respondents (and over the objection of Counsel for the Public Utilities Division) that the Respondents be permitted through this historical approach to establish: (1) the circumstances and manner in which the present voting power distribution among security holders of the system was created, as bearing on the fairness and equity of such distribution; and (2) the valuable functions performed by the subholding companies in the past, as bearing on their present and future usefulness. Such evidence presented by the Respondents was substantially supplemented and clarified by Counsel for the Division through cross-examination and rebuttal.

Examination of this entire record has made it abundantly clear that all three questions listed above must be answered in the affirmative. *17/* In particular, the historical survey clearly established, as discussed hereinafter in detail, that the subholding companies in their origin were artificial contrivances interposed by Bond and Share into the structure of the system to serve as pyramiding devices, that these companies have continued to perform this particular function down to the present time, and that they have not in the past served, nor do they now serve, any useful and beneficial purpose. Accordingly, in light of the provisions of Section 11(b)(2) and the underlying policies of the Act, we have been impelled to the conclusion that it is necessary to require the dissolution of American and Electric.

Our detailed discussion of these matters will be under the following heads: (1) capitalization and structure of Bond and Share, American and Electric; (2) the role of

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17/ Indeed, it is apparent that even before the record reached completion, the Respondents themselves in effect conceded the affirmative of the first and second of the aforementioned questions by the filing of their 11 (e) plans, considered *infra*.

American and Electric in the development of the Bond and Share system; (3) the impact of Section 11 on American and Electric as they are now constituted; and (4) the contentions of Respondents respecting the 11(e) plans.

III. Capitalization and Structure of Bond and Share, American and Electric

A. *Bond and Share*

In our earlier Findings and Opinion dealing with National, we described in some detail the holding company system of Bond and Share. *17a/* We there pointed out that the Bond and Share system is a pyramid-like structure of which Bond and Share itself constitutes the apex, 5 subholding companies create an intermediate tier, *18/* and approximately 237 direct and indirect subsidiaries of the latter form the base. *18a/*

The 5 subholding company subsidiaries of Bond and Share and their consolidated subsidiaries have a combined consolidated capitalization (including surplus) of $2,889,561,848 and aggregate consolidated assets per books of $3,434,468,571. They constitute the largest single public utility holding company system registered under the Public Utility Holding Company Act of 1935. This is true not only in point of book capitalization and book assets, but also in respect of the number of customers and areas served by the

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17a/ *Electric Bond and Share Company et al*, Holding Company Act Release No. 2962 (9 S.E.C. 978).

18/ The 5 subholding companies are: American & Foreign Power Company, Inc., American Gas and Electric Company, and American, Electric and National. An appeal by American Gas and Electric Company from our Order denying its application to be declared not a subsidiary of Bond and Share is pending in the Court of Appeals for the District of Columbia.

18a/ See chart set forth as Appendix A.

operating companies of the system, and quantity of electricity generated and gas sold. *19/*

The capitalization and surplus of Bond and Share are as follows: *20/*

	Number of Shares	Stated Value
Capital Stock		
$5 Preferred Stock, No Par	280,300 shs.	$28,030,000.00
$6 Preferred Stock, No Par	1,101,955 shs.	110,195,500.00
Common Stock, $5 Par	5,250,357.66 shs.	26,251,788.33
Total Capital Stock		$164,477,288.33
Surplus		
Capital Surplus		$316,504,929.82
Earned Surplus		63,116,391.94
Total Surplus		$379,621,321.76
Total Capital Stock and Surplus		$544,098,610.09

B. *American*

The capitalization and surplus of American per books of the company (as of December 31, 1941), are as follows:

19/ The companies of the Bond and Share system (not including American & Foreign Power Company, Inc. and its subsidiaries) serve with electricity more than 2313 communities having a population of 2500 or more, and serve with gas more than 154 such communities. The total population of such communities is approximately 12,000,000, and they are located in 32 states of the United States.

The subsidiaries of American & Foreign Power Company, Inc. serve with electricity or gas more than 1021 communities located in 12 foreign countries, principally in Cuba and Central and South America.

The operating companies of the Bond and Share system in the United States in 1941 generated 21,000,000,000 kilowatt hours of electricity (or approximately 13% of the total central station energy generated by all utility companies in the United States in 1941) and sold a total of 281,381,000 Mcf. of gas (or 14% of the total sold in the United States in 1941 by all utility companies.)

20/ As of December 31, 1941.

Type of Security	Amount Outstanding	Principal Amount or Stated Value
Gold Debenture Bonds, American 6% Series, due 2016	$41,948,000	$41,948,000.00
Southwestern Power & Light Company, 6% Gold Debenture Bonds Series A, due 2022 (assumed)	3,901,000	3,901,000.00
Preferred Stock ($6), Cumulative No Par*	793,581 2/10 shs.	79,300,926.00
$5 Preferred Stock, Cumulative, No Par	978,444 shs.	97,844,400.00
Common Stock; No Par**	3,008,511 27/50 shs.	37,434,351.29
Capital Surplus		36,025.64
Earned Surplus		10,028,908.43
Total Capitalization and Surplus		$270,493,611.36

* Includes scrip equivalent to 26 2/10 shares.

** Includes scrip equivalent to 1,918 27/50 shares.

Each share of the Cumulative Preferred Stock and common stock is entitled to one vote with respect to the ordinary business of the corporation. The Preferred Stock ($6) and the $5 Preferred Stock have equal rank as to dividends and in liquidation in preference to the common stock and are entitled in liquidation to $100 per share plus unpaid cumulative dividends. As of December 31, 1941, unpaid cumulative dividends in arrears on the two classes of preferred stock totaled $35,114,788, *21/* representing more than 3½ years' requirements on each class.

Of the securities of American outstanding, Bond and Share owns 51,840 shares of the $5 Preferred Stock (5.30% of the number of shares of such issue outstanding) and 937,221 shares of the common stock (equal to 31.15% of the num-

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21/ $17,319,337 on the Preferred Stock ($6) or $21.82 per share; $17,795,450 on the $5 Preferred Stock or $18.18 per share.

ber of common shares outstanding). *22/* By reason of its ownership of these securities, Bond and Share is vested with 20.7% of the total voting power of all the securities of American. These shares of common and preferred stock have a stated or liquidating value, including surplus and preferred arrearages, of $9,966,795 or 3.68% of American's total capitalization of $270,493,611 (including long-term debt and surplus and after adjustment for preferred arrearages). Their carrying value on the books of Bond and Share is $23,739,432. At June 30, 1942, the approximate market value of such shares was $1,300,000.

22/ In addition to the securities of American owned by Bond and Share, the latter also owns debt securities of American's subsidiaries in the aggregate principal amount of $6,120,000, as follows:

Name of Company	Security	Principal Amount
Florida Power & Light Company	First Mortgage Gold Bonds 5% Series due January 1, 1954	$ 417,000
Minnesota Power & Light Company	First and Refunding Mortgage Gold Bonds, 5% Series due June 1, 1955	90,000
	First and Refunding Mortgage Gold Bonds, 4½% Series due May 1, 1978	161,000
Pacific Power & Light Company	First Mortgage and Prior Lien Gold Bonds, 5% Series due August 1, 1955	285,000
Texas Electric Service Company	First Mortgage Gold Bonds 5% Series, due July 1, 1960	254,000
Texas Power & Light Company	First and Refunding Mortgage Gold Bonds, 5% Series due November 1, 1956	113,000
	First Mortgage Bonds 4¾% Series due September 1, 1965	4,800,00
		$6,120,000

All the foregoing securities were acquired by Bond and Share by purchase on the open market from time to time, except the bonds of Texas Power & Light Company which were a direct purchase in 1935 in connection with a refunding operation.

American has the following 16 subsidiaries which are classed as public utility companies under the Act:

Name	State of Organization	Nature of Business
Central Arizona Light & Power Company	Arizona	Electric and Gas
Florida Power & Light Company	Florida	Electric and Gas
Kansas Gas and Electric Company	West Virginia	Electric
Minnesota Power & Light Company	Minnesota	Electric and Steam Heating
Montana Power Company (The)	New Jersey	Electric, Gas, Steam Heating, Water
Nebraska Power Company	Maine	Electric
New Mexico Electric Service Company	New Mexico	Electric
Northern Power Company	Wisconsin	Electric
Northwestern Electric Company	Washington	Electric and Steam Heating
Pacific Power & Light Company	Maine	Electric, Steam Heating, Water
Portland Gas & Coke Company	Oregon	Gas
Superior Water, Light and Power Company	Wisconsin	Electric, Gas, Water
Texas Electric Service Company	Texas	Electric
Texas Power & Light Company	Texas	Electric
Texas Public Utilities Corporation	Texas	Electric, Ice, Water
Washington Water Power Company (The)	Washington	Electric, Water, Steam Heating

American has 6 additional direct subsidiaries, which are not public utility companies within the meaning of the Act, and 13 additional indirect non-utility subsidiaries, as identified in Appendix A.

The consolidated capitalization of American and its subsidiaries as per balance sheet of December 31, 1941, was as follows:

Long Term Debt	
American	$ 45,849,000
Subsidiaries	311,437,072

Preferred Stocks		
American	177,145,326	
Subsidiaries	11,622,100	
Minority Interest	621,193	
Undeclared Cumulative Dividends on Preferred Stock of Subsidiaries Held by Public	3,615,226	22a/
Common Stock		
American	37,434,351	
Capital Surplus	36,026	
Earned Surplus	45,968,643	
	$733,728,937	

The foregoing statement of consolidated capitalization does not reflect undeclared cumulative dividends in arrears on the preferred stocks of American at December 31, 1941 amounting to $35,114,788.

The consolidated assets of American and its subsidiaries at December 31, 1941, were carried at $851,251,525. The aggregate par, stated or assigned value of the securities of its subsidiaries owned by American was $260,227,223, and their book value on the books of the issuers, including surplus and preferred dividend arrearages, was $304,787,950. American carried these securities in its investment account at $251,537,054.

The securities of its public-utility subsidiaries owned by American at December 31, 1941, represented the following percentages of the total debt and stock capitalization, including surplus, and of total voting power of the respective companies.

22a/ Preferred dividends in arrears:

Portland Gas & Coke Company	$3,283,161
Preferred Dividends accrued	332,065
	$3,615,226

Name	Total Debt and Stock Capitalization Including Surplus*	% of Capitalization Represented by Securities Owned by American	% of Total Voting Power of Securities Owned by American
Central Arizona Light & Power Company	$ 12,063,787	32.23	98.04
Florida Power & Light Company	124,706,306	46.86	100.00
Kansas Gas and Electric Company	35,196,471	24.32	90.55
Minnesota Power & Light Company	74,024,334	34.19	93.04
Montana Power Company (The)	139,129,358	53.14	93.73
Nebraska Power Company	36,861,039	24.66	89.90
New Mexico Electric Service Company	1,459,055	99.99	99.99
Northern Power Company	737,872	98.80	98.80
Northwestern Electric Company	18,854,680	39.10	67.65
Pacific Power & Light Company	38,764,418	29.83	94.66
Portland Gas & Coke Company	21,218,200	11.07	83.23
Superior Water Light and Power Company	4,192,105	89.40	66.59
Texas Electric Service Company	72,267,993	44.66	98.97
Texas Power & Light Company	80,982,852	35.68	96.77
Texas Public Utilities Corporation	2,881,543	99.98	99.98
Washington Water Power Company (The)	63,261,743	48.67	99.69

* After adjustment for preferred dividend arrearages, to eliminate reacquired preferred stocks, and to restate preferred stocks at liquidating values.

As of December 31, 1941, the public utility subsidiaries of American served with electricity approximately 148 communities having a population of 2,500 or over and served

with gas some 26 such communities. The total population of the communities so served was approximately 2,740,000, these communities being located in the States of Arizona, Florida, Idaho, Iowa, Kansas, Minnesota, Missouri, Montana, Nebraska, New Mexico, Oregon, Texas, Washington, and Wisconsin.

Each of the 16 public utility subsidiaries of American has a comprehensive complement of skilled personnel. During the year 1940, the aforementioned 16 subsidiaries of American had an aggregate of 12,757 officers and employees, and annual payrolls aggregating $21,906,576. *23/*

Each of the public utility subsidiaries of American has continuously since the formation of Ebasco Services Incorporated, *23a/* in November, 1935, had a service contract with that company. Pursuant to such contracts, the subsidiaries of American have each year paid to Ebasco Services Incorporated, the fees provided therein and have received (or

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23/

Name	Officers and Employees	Payroll
Central Arizona Light & Power Company	469	$ 901,283
Florida Power & Light Company	1,891	3,014,802
Kansas Gas and Electric Company	964	1,655,244
Minnesota Power & Light Company	901	1,584,691
Montana Power Company (The)	1,171	2,478,973
Nebraska Power Company	850	1,550,142
New Mexico Electric Service Company	60	63,501
Northern Power Company	14	4,161
Northwestern Electric Company	551	1,082,960
Pacific Power & Light Company	865	1,565,652
Portland Gas & Coke Company	673	1,103,783
Superior Water Light & Power Company	163	269,145
Texas Electric Service Company	913	1,617,042
Texas Power & Light Company	1,617	2,384,058
Texas Public Utilities Corporation	235	222,777
Washington Water Power Company (The)	1,420	2,408,342
Total	12,757	$21,906,576

23a/ Ebasco Services Incorporated is a wholly owned subsidiary of Bond and Share which "services" the operating companies of the system. See discussion *infra*.

have been entitled to receive) consultative, technical or other services incident to the conduct of their operations, including services with respect to financing and refinancing programs.

C. *Electric*

The capitalization and surplus of Electric per books of the company as of December 31, 1941, were as follows:

Type of Security	Amount Outstanding	Principal Amount or Stated Value
Gold Debentures, 5% Series, Due 2030	$30,380,000	$ 30,380,000
$7 Preferred Stock, Cumulative, No Par	515,135 shs.*	
$6 Preferred Stock, Cumulative, No Par	255,430 2/3 shs.	155,044,139
Second Preferred Stock, Series A, ($7) Cumulative, No Par	75,189 shs.	
Common Stock, No Par	3,453,189 shs.**	
Earned Surplus		6,868,838
Total Capitalization and Surplus		$192,292,977

*Includes 973 shares held in Treasury:

**Includes 902 shares held in Treasury.

In addition to the securities set forth above, Electric had outstanding as of December 31, 1941, 536,254 option warrants entitling the holders, without limitation as to time, to purchase a like number of shares of common stock at $25 a share. *24/*

Each share of $7 Preferred Stock, $6 Preferred Stock,

24/ In lieu of cash, each share of Second Preferred Stock, Series A, ($7) surrendered with option warrants for four shares of common stock is accepted at $100 in payment for four shares of common stock.

and common stock of Electric is entitled to one vote with respect to ordinary business of the corporation. The Second Preferred Stock, Series A ($7) has no general voting power.

The $7 Preferred and $6 Preferred Stock have equal rank, prior to the Second Preferred Stock, Series A ($7) as to dividends and in liquidation, and have a liquidating value of $100 per share plus unpaid cumulative dividends. As of June 30, 1942, unpaid cumulative dividends in arrears on both classes of preferred stock totaled $47,810,357, *25/* representing more than 9 years' requirements on each class. The Second Preferred Stock, Series A ($7) has a liquidating value of $100 per share plus unpaid cumulative dividends. As of June 30, 1942, dividends in arrears on this stock totaled $5,394,811 ($71.75 per share) representing approximately 10 years' requirements on the Second Preferred Stock, Series A ($7).

Of the securities of Electric outstanding, Bond and Share owns 485 shares of the $7 Preferred Stock (.09% of the number of shares of such issue outstanding), 13,905 shares of the $7 Second Preferred Stock (18.5% of the number of shares of such issue outstanding) and 1,976,638 shares of the common stock. (57.3% of the number of shares of such issue outstanding). In addition, Bond and Share owns 393,408 option warrants to purchase common stock. By reason of its ownership of these securities, Bond and Share is vested with 46.8% of the total voting power of all the securities of Electric. The securities owned by Bond and Share have a stated or liquidating value, including surplus and preferred arrearages, of $17,558,108, or 9.14% of Electric's total capitalization of $192,189,868, including surplus.

25/ Of which $33,531,932 or $65.21 per share was applicable to the $7 preferred stock and $14,278,425 or $55.90 per share was applicable to the $6 preferred stock.

Their carrying value on the books of Bond and Share is $36,606,916. At June 30, 1942, the market value of such securities was approximately $2,000,000. *26/*

Electric has the following ten subsidiaries which are classed as public utility companies under the Act:

Name	State of Organization	Nature of Business
Arkansas Power & Light Company	Arkansas	Electric, gas, water, ice and heating. *27/*
Dallas Power & Light Company	Texas	Electric
Idaho Power Company	Maine	Electric
Louisiana Power & Light Company	Florida	Electric, gas, transportation and ice
Mississippi Power & Light Company	Florida	Electric, gas, and water
New Orleans Public Service Inc.	Louisiana	Electric, gas, and transportation
United Gas Corporation	Delaware	Gas

26/ In addition to the securities of Electric owned by Bond and Share, the latter also owns certain of the securities of Electric's subsidiaries as follows:

Subsidiary	Security	Principal Amount or Number of Shares
Arkansas Power & Light Company	5% First and Refunding Mortgage Bonds	$ 915,000
Houston Gas Securities Company	5% Collateral Trust Bonds	440,000
Louisiana Power & Light Company	5% First Mortgage Bonds	377,000
Mississippi Power & Light Company	5% First Mortgage Bonds	431,000
New Orleans Public Service Inc.	5% First and Refunding Mortgage Bonds	900,000
Utah Power & Light Company	5% Thirty-year Bonds	300,000
United Gas Corporation	6% Debentures	25,000,000
" " "	6% Demand Notes	25,925,000
" " "	6% Advance on open account	2,000,000
" " "	$7 Preferred Stock ($100 liq. value)	17,310 shares
" " "	Common Stock ($1 par value)	752,666 shares
" " "	Option Warrants	151,005 shares

27/ Leases transportation facilities to its subsidiary Capital Transportation Company.

Name	State of Organization	Nature of Business
Utah Power & Light Company	Maine	Registered holding company, electric and heating
Utah Light and Traction Company	Utah	Electric and transportation *28/*
The Western Colorado Power Company	Colorado	Electric

The last two companies, in addition to being subsidiary companies of Bond and Share and of Electric, are subsidiary companies of Utah Power & Light Company, a registered holding company.

Electric has 3 additional direct subsidiaries, which are not public utility companies within the meaning of the Act, and 11 additional indirect non-utility subsidiaries, as shown in Appendix A.

The consolidated capitalization of Electric and its subsidiaries as per balance sheet of December 31, 1941 was as follows:

Long Term Debt	
Electric	$ 30,380,000
Subsidiaries	260,441,615 *29/*
Preferred Stocks	
Electric	84,575,467
Subsidiaries	117,405,300
Minority Interest	2,534,194

28/ Leases electric facilities to Utah Power & Light Company.

29/ Includes United Gas Corporation Unsecured Note—6% due on demand, $25,925,000, and Advance on Open Account—6% due on Demand, $2,000,000 both held by Bond and Share and carried as current liabilities on United's balance sheet. Cf. Holding Company Act Release No. 3301.

Undeclared Cumulative Dividends on Preferred Stock of Subsidiaries Held by Public	$17,803,228	29A/
Common Stock		
Electric	70,468,672	
Earned Surplus	33,987,475	
	$617,595,951	

The foregoing statement of consolidated capitalization does not reflect undeclared cumulative dividends in arrears on the preferred stocks of Electric at December 31, 1941 amounting to $50,889,325.

The consolidated assets of Electric and its subsidiaries, at December 31, 1941, were carried at $749,183,549. The aggregate par, stated or assigned value of the securities of its subsidiaries owned by Electric was $199,802,994, and their book value on the books of the issuers, including surplus and preferred dividend arrearages, was $256,415,384. Electric carried these securities in its investment account at $184,409,070.

The securities of its public utility subsidiaries owned by Electric at December 31, 1941, represented the following percentages of the total debt and stock capitalization (including surplus) and of total voting power of the respective companies.

29A/ Preferred Dividends in arrears:

Dallas Railway & Terminal Company	$ 219,692
Mississippi Power & Light Company	312,431
United Gas Corporation	9,315,064
Utah Power & Light Company	7,746,113
Preferred dividends accrued	209,928
	$17,803,228

Name	Total Debt and Stock Capitalization Including Surplus**	% Of Capitalization Represented by Securities Owned by Electric	% of Total Voting Power of Securities Owned by Electric
Arkansas Power & Light Company*	$ 64,237,910	23.7	90.2
Dallas Power & Light Company	30,084,423	18.8	70.0
Idaho Power Company	42,604,195	43.5	71.6
Louisiana Power & Light Company	34,801,488	32.4	95.4
Mississippi Power & Light Company	32,645,490	29.2	94.0
New Orleans Public Service Inc.	68,770,990	30.4	95.1
United Gas Corporation*	256,334,928	54.6	61.6
Utah Power & Light Company*	109,483,831	23.7	92.4

* Consolidated Basis.

** After adjustment for preferred dividend arrearages, to eliminate reacquired preferred stocks, and to restate preferred stocks at liquidating values.

As of December 31, 1941, the public utility subsidiaries of Electric served with electricity approximately 104 communities having a population of 2,500 or over and served with gas some 98 such communities. The total population of the communities so served was approximately 2,808,244, these communities being located in the states of Arkansas, Colorado, Idaho, Louisiana, Mississippi, Nevada, Oregon, Texas, Utah, and Wyoming, and in Mexico. Public services of various kinds including electric and gas were rendered by all subsidiaries to approximately 195 communities having a total population of approximately 3,712,907, these communities being located in the states of Alabama and Florida in addition to the states listed above.

Each of the active subsidiaries of Electric has a comprehensive complement of skilled personnel. During the

year 1940, the subsidiaries of Electric had an aggregate of 14,185 officers and employees and annual payrolls aggregating $23,200,676.58. *30/*

Each of the public utility subsidiaries of Electric has continuously since the formation of Ebasco Services Incorporated, in November 1935, has a service contract with that company. Pursuant to such contracts, the subsidiaries of Electric have each year paid to Ebasco Services Incorporated, the fees provided therein and have received (or have been entitled to receive) consultative, technical and other services incident to the conduct of their operations, including services with respect to financing and refinancing programs.

IV. The role of American and Electric in the development of the Bond and Share System.

A. *Creation of the Bond and Share System*

Bond and Share was organized under the laws of New York on February 27, 1905, by the General Electric Company, a leading manufacturer of electrical equipment. General Electric's purpose in the formation of Bond and Share seems to have been threefold: (1) to realize as fully as possible upon various utility securities which it had acquired

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	Officers and Employees	Payroll
Arkansas Power & Light Company	1,055	$ 1,662,816.49
Dallas Power & Light Company	992	1,711,538.00
Idaho Power Company	845	1,609,400.28
Louisiana Power & Light Company	857	1,262,482.52
Mississippi Power & Light Company	846	1,316,763.24
New Orleans Public Service Inc.	2,878	4,827,032.32
United Gas Corporation and subsidiaries	4,991	7,842,463.00
Utah Power & Light Company	1,261	2,295,308.50
Utah Light and Traction Company	343	505,670.52
The Western Colorado Power Company	117	167,201.71
	14,185	$23,200,676.58

in the process of selling its equipment; (2) to obtain for itself a direct proprietary stake in a promising young industry with which it was already closely affiliated; (3) to utilize the position it would acquire as a proprietary factor in the utility industry to advance the sales of its equipment.

At the outset, General Electric invested approximately $1,300,000 in cash in Bond and Share, and turned over to it miscellaneous securities having a par value of $1,258,150. In return it received from Bond and Share all that company's outstanding capital stock consisting of $2,000,000 par value common and $2,000,000 par value preferred. During the next twenty years (up to January 20, 1925) General Electric subscribed for additional common stock from Bond and Share in an aggregate total of approximately $16,000,000 cash and securities having a par value of some $3,000,000. *31/*During the same period General Electric received from Bond and Share more than $13,000,000 as cash dividends and $4,000,700 par value of common stock as stock dividends. When in 1925, General Electric disposed of its investment in Bond and Share, the market appraised its value at about $117,000,000. *32/* The record also indicates that during the entire period of Bond and Share's existence, General Electric Company had sold to companies of

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31/ In addition, it subscribed from time to time for preferred stock, all of which it sold, together with the preferred stock originally acquired, except 300 shares which it still held at January 30, 1925. At the latter date, General Electric's book investment in Bond and Share consisting of the 300 shares of preferred and the 250,000 shares of common (the entire amount of common outstanding) was $25,000,000.

32/ Based on an average market price of $65 per share for the common stock of Electric Bond and Share Securities Corporation for the 43-week period from February 28, to December 28, 1935. During that period the price ranged from 55⅜ to 80¾ per share.

the Bond and Share system electrical equipment in vast amounts. *33/*

In December 1924, there was introduced in the United States Senate (68th Congress) Senate Resolution 286 charging General Electric Company with exercising undue control over the electric power industry, and shortly thereafter the Senate adopted Senate Resolution 329 (68th Congress, 2nd Session) directing the Federal Trade Commission to investigate to what extent and by what means the General Electric Company or its security holders ". . . monopolize or control the production generation or transmission of electric energy or power". *34/* On December 30, 1924, the board of directors of General Electric Company voted that the company should "divorce itself from the Electric Bond and Share Company". On January 13, 1925, a company called Electric Bond and Share Securities Corporation was organized, and on January 20, 1925, General Electric transferred to the new company its entire holdings of securities of Bond and Share in exchange for all the capital stock of the new company. *35/* This stock was then declared out as a dividend by General Electric to

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33/ Although a total figure for the entire period is not available, the record indicates that in a single 6-year period (1929-1934, inclusive) companies of the Bond and Share system purchased an aggregate of $308,000,000 of equipment, a substantial part of which came from General Electric Company.

34/ The investigation referred to was a predecessor of the comprehensive investigation of the utility industry which was thereafter undertaken by the Federal Trade Commission pursuant to Senate Resolution 83, Seventieth Congress, First Session (Approved February 15, 1928), to which reference is made in Section 1 (b) of the Public Utility Holding Company Act of 1935.

35/ All the officers and directors of Electric Bond and Share Securities Corporation, from organization in 1925 until consolidation and merger with Bond and Share in 1929, were officers and directors of Bond and Share or associated with the latter's counsel, Simpson Thatcher & Bartlett.

its stockholders. Subsequently, on March 13, 1929 Electric Bond and Share Securities Corporation was consolidated and merged with Bond and Share to form the present Bond and Share.

At December 31, 1924, just prior to the date when General Electric Company made the transfer of securities to the Securities Company in 1925, Bond and Share's capitalization totaled $69,487,887 ($25,000,000 common, $25,000,000 preferred, and $19,487,887 surplus). By the end of 1929, total capitalization had increased to $929,045,212, a write-up of $399,909,830 having taken place in connection with the consolidation and merger in March 1929. By the end of 1931, capitalization had decreased to $540,325,893, approximately its present amount, a write-down of $441,387,724 having been effected during the year 1931.

Throughout the history of Bond and Share, the company and its system were dominated primarily by the mind and spirit of one man—Sidney Z. Mitchell. *36/* Mitchell seems to have come to Bond and Share at its inception, already fully alive to the potentialities of the subholding company device as an instrumentality through which Bond and

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36/ From the organization of Bond and Share in 1905 until 1909, Mitchell was Vice-President and a Director (during this period Marsden T. Perry, an officer of General Electric, was President). From 1909 until 1929 Mitchell was President of Bond and Share and most of the subholding companies; from 1923 until March 1933, he was Chairman of the Board of Bond and Share and its subholding companies. On the latter date, Mitchell resigned all offices in the system and retired. The present management of Bond and Share and the subholding companies are for the most part individuals who were trained by and worked closely with Mitchell.

Mitchell appears to have enjoyed the complete confidence of the management of General Electric. At no time did General Electric have more than a relatively small number of direct representatives on Bond and Share's Board of Directors, and when General Electric in 1925 transferred control of Bond and Share to Electric Bond and Share Securities Corporation, Mitchell was made President and Chairman of the Board of the new company.

Share could exercise control of vast utility systems with a minimum of investment.

Indeed, the Mitchell plan seems to have contemplated at the outset that through effective use of the subholding company expedient, Bond and Share was to control its system with no investment, except such as was represented by the time and talents of its executives; and it was only in later years that the management of Bond and Share seems to have found it necessary or desirable to make some cash investments in control securities of its system.

Bond and Share made its first application of the Mitchell plan scarcely one year after the company's inception in the organization of American Gas and Electric Company, as a subholding company to take over the assets of Electric Company of America. We have elsewhere described the circumstances and details surrounding the organization of American Gas and Electric *37/* and deem it unnecessary to repeat them here; except to point out that from the organization and financing of American Gas and Electric Company in 1906, Bond and Share emerged with a profit of $30,000 cash and 4,700 shares of the company's common stock (having a par value of $235,000) equal to approximately 9.5% of the total voting securities, and with S. Z. Mitchell as chairman of the new company's Board of Directors and Executive Committee on both of which Bond and Share had heavy representation.

In 1909, Bond and Share took steps to set up another subholding company in its system. The resulting product was American, and the outcome for Bond and Share financially and in other respects was even more favorable than in the earlier formation of American Gas and Electric. The organization of American really established the basic pattern which Bond and Share followed in instance

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37/ American Gas and Electric Company (File No. 31-425), Holding Company Act Release No. 2749 (9 S.E.C. 247).

after instance during the following years, and which achieved probably its most polished form in the creation of Electric in 1925. Accordingly, the details of American's organization and subsequent operations merit particular attention.

B. *American*

1. Organization

Bond and Share caused American to be incorporated in September 1909 to acquire a group of securities representing a controlling interest in five utility enterprises, four of which operated in Kansas and one in Oregon. All of the securities involved were owned by Bond and Share *38/* and represented an investment by Bond and Share of approximately $1,700,000. *39/* The resolution of Bond and Share's executive committee approved the plan for the organization and financing of American "in order to minimize the risks and commitments of this company" in connection with the aforementioned securities.

As a first step in the organization and financing of American, a so-called "syndicate" was organized with Bond and Share as syndicate manager. The function of the syndicate was to acquire from Bond and Share the securities of the five utility companies and to underwrite the raising of $2,500,000 cash by sale to the public of American's securities. *40/* Bond and Share itself participated in the syndi-

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38/ None of the securities had been owned by Bond and Share for more than 4 months, with one minor exception.

39/ This sum includes all items of expense (including investigation) incident to the purchase of the securities. It appears that the book value of these securities was approximately $1,600,000.

40/ It was estimated that $2,000,000 would be needed to acquire from Bond and Share the securities of the five companies and to reimburse the syndicate for expenses, and that the remaining $500,000 would be utilized in making a cash payment to American.

cate for a 60% interest ($1,500,000) and the investment banking house of William P. Bonbright & Company *41/* was granted the remaining 40% ($1,000,000) "with the understanding however, that Bonbright & Company shall give to employees of this company (Bond and Share) and to such other persons or banks as the officers of this company deem it desirable to interest in the project a reasonable proportion of their two-fifths allotment in the syndicate." In fact, Bonbright & Company was permitted to retain only $100,000 of the allotment, and the remaining $900,000 was divided among Mitchell and other officials of Bond and Share, General Electric, American Gas and Electrict and their friends and associates. *42/*

The "syndicate" transferred to the newly formed American through an intermediary the securities of the aforementioned five utilities plus $500,000 in cash. *43/* In return, American issued to the syndicate's intermediary its capital

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41/ For a discussion of the intimate relations between Bond and Share and Bonbright & Company, see *infra.*, n. 76.

42/ It is evident that the so-called "syndicate agreement" was in reality merely an arrangement for granting participations to officials of Bond and Share and affiliated interests in what seemed certain to be a profitable deal, and that no true underwriting was desired or obtained. Bond and Share itself retained 60% of the underwriting "risk", and 36% additional was absorbed by its officers and associates, leaving Bonbright with only 4% ($100,000 out of $2,500,000).

The largest participant in the Bonbright allotment was S. Z. Mitchell, who participated to the extent of $200,000, and the next largest was Charles A. Coffin, Chairman of the Board of General Electric, who was granted a $175,000 participation. Other officials of the companies and their associates were granted smaller participation.

43/ It was testified that in 1911 and 1912 Bond and Share "donated" to American additional sums totaling $80,223 "by reason of the very favorable arrangements made and carried out in the disposition of the preferred and common stock of the American Power & Light Company."

stock consisting of $2,500,000 par value preferred stock and $5,500,000 par value common stock, or a total of $8,000,000 of securities, all of which were handed over to Bond and Share as syndicate manager. The securities received by American were entered in the investment account at $7,500,000.

The $2,500,000 cash "underwritten" by the syndicate was procured through the marketing to the public by Bonbright & Company of the stock of American in blocks consisting of $1,000 par value of preferred and $800 par value common, for the aggregate sum of $1,000 per block. 25,000 such blocks were sold, leaving a balance of $3,500,000 par value of common, out of which $798,100 par value common was paid over to brokers and dealers as commissions. The syndicate thus remained with $2,701,900 par value of common as its profit. Of this amount, $1,621,100 par value of common was paid over to Bond and Share for its 60% participation, and $1,080,800 par value common was distributed among the other syndicate participants. *44/* Bond

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44/ Thus, Mitchell received approximately 2,161 shares ($216,100 par value); Coffin approximately 1,891 shares, and the others in proportion. The record indicates the following range for the market price of American:

	High	Low		High	Low		High	Low
1910	49	42	1920	66	39	1930	119⅜	36⅛
1911	76½	54	1921	67	39	1931	64⅞	11⅝
1912	74½	66	1922	129		1932	17¼	3
1913	73	58	1923	176	145	1933	19⅞	4
1914	73	55	1924*	69½	37½	1934	12¼	3
1915	69	59	1925	68½	48½	1935	9⅝	1½
1916	78	64	1926	79½	48¼	1936	14⅜	7½
1917	86	42	1927	73⅜	54	1937	16½	3
1918	55	38	1928	95	62¼	1938	7½	3¼
1919	72	54	1929	175¾	64¼	1939	7	3⅝
						1940	5¼	2
						1941	3¼	⅝

* Common stock split 10 for 1 in 1924. Thus, the 175¾ market price which the split stock reached in 1929 was the equivalent of $1,757 per share on the original basis.

and Share also received $50,000 cash from the members of the syndicate. *45/*

As a result of the financing of American, Bond and Share was reimbursed in full for all costs and expenses of every kind in connection with the securities transferred to American and the operations of the syndicate; in addition, it realized cash profits of approximately $120,000 *46/* on securities most of which had been owned only a few months, and it also held 16,211 shares of common stock of American at no cost. These shares constituted 29.47% of the total amount of common outstanding and 20.26% of total voting securities.

S. Z. Mitchell was made Chairman of the Board of Directors of American, of which eight out of eleven members were associated with Bond and Share or its affiliated companies. Mitchell was also made Chairman of the six-man executive committee, of which five members were affiliated with Bond and Share. All other employees and officers of American were officers or employees of Bond and Share, *47/* and American was assigned office space in the offices of Bond and Share.

It is thus apparent that Bond and Share had succeeded

45/ The syndicate agreement provided that "all members of the syndicate other than Electric Bond and Share Company are to pay it in cash 5 percent of their respective participations in the syndicate, said 5 percent payment to be made as an arbitrary allowance to Electric Bond and Share for its general expenses, risk, and profit."

46/ The $120,000 cash profit mentioned is after allowing for the $80,223 "donations" made by Bond and Share to American in 1911 and 1912, to which reference was previously made.

47/ The record indicates that up to 1917, salaries of some of these individuals was apportioned between Bond and Share and American. From 1917 to November 1935, however, all salaries were paid exclusively by Bond and Share, which in turn collected a service charge from American as is more fully described hereafter.

in realizing for itself complete working control of the new company and better than a 20% equity in it, after recovering every dollar of its investment in the securities transferred to American, plus a cash profit of approximately $120,000. Otherwise stated, Bond and Share had sold out an 80% interest in the aforementioned securities, recovering thereby its entire cost plus a substantial profit without in any way parting with control of such securities or of the properties which they represented. 48/ These facts obviously afford some illumination as to the meaning of Bond and Share's executive committee when it authorized the formation of American "to minimize the risks and commitments" of Bond and Share.

The obverse side of the coin must not be overlooked. American had issued $8,000,000 par value of its own securities to acquire $500,000 cash and securities which had recently cost Bond and Share less than $1,700,000. The cash paid over to Bond and Share for the securities and the profits realized by Bond and Share were furnished by the public which purchased American's securities. Nevertheless, control of the company rested firmly in Bond and Share's possession.

2. Growth of American and Relations with Bond and Share Until 1935

Several months after the organization of American, the latter caused the formation of a new company named Kansas Gas and Electric Company to which were transferred the properties of the Wichita and Pittsburg companies whose securities had previously been acquired from Bond and Share. American took from the Kansas Company bonds, preferred stock, and common stock in the aggre-

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48/ Moreover, as has been related, in the process of achieving this result, individuals affiliated with the company were enabled to garner handsome profits for their personal accounts.

gate principal amount and par value of $5,700,000. 49/ American sold to the public through Bonbright & Co. the bonds and preferred stock of Kansas for net proceeds of $2,381,257. American thus retained 30,000 shares of Kansas common (the entire amount outstanding) having a par value of $3,000,000, at a system cost of approximately $700,000, of which some $300,000 represented discounts suffered on the sale of the senior securities. Through ownership of the common, American was vested with absolute control of Kansas. 50/

In June 1910, a similar program was followed by Ameri-

49/ $1,600,000 5% mortgage bonds; $1,100,000 par value 7% preferred stock; $3,000,000 par value common stock. Total costs sustained by Bond and Share and American in connection with the assets transferred to Kansas aggregated approximately $3,100,000, or about $400,000 more than the aggregate principal amount of bonds and par value of preferred stock. The assets were, of course, placed on Kansas' books at a sum approximately equal to the securities issued by it, thus carrying into the plant and investment account of Kansas the system write-up of more than $2,500,000. The record also establishes that on the books of the predecessor companies the properties, immediately prior to their transfer to Kansas, stood at the aggregate sum of $2,424,378, as compared with the sum of $5,500,000 entered in the plant account of Kansas.

50/ The record established that the pattern used in capitalizing the Kansas Company became more or less the standard pattern of capitalization for operating companies throughout the Bond and Share system; namely, to write up the properties on the subsidiaries' books so that the holding company would be reimbursed for its entire investment through sale to the public of the bonds and preferred stocks, leaving it the entire common stock at no cost, or as close thereto as possible. While there were a few instances in which the plan did not fully succeed due to some untoward development, such cases were balanced by those in which the system attained a substantial *minus* cost for the operating company common. Apparent instances of the latter category are found in Pennsylvania Power & Light Company, a subsidiary of National, Nebraska Power Company, a subsidiary of American, and Louisiana Power & Light Company, Mississippi Power & Light Company, and Utah Power & Light Company, subsidiaries of Electric.

can with respect to Astoria Electric Company and other properties which it had acquired in the States of Washington and Oregon, the new subsidiary being named Pacific Power & Light Company. In the same year control was acquired by American of the Portland Gas Company, which was reorganized as Portland Gas & Coke Company. In 1912 American, through a complex pyramid of subholding companies devised by Bond and Share, acquired control of various properties in Texas which were ultimately centralized in three operating company subsidiaries of American: Texas Power & Light Company, Texas Electric Service Company, and Texas Public Utilities Corporation. In later years, Nebraska Power Company (1917), Minnesota Power & Light Company (1923), and Florida Power & Light Company (1925) were successively organized, and in addition, American acquired control of Central Arizona Light & Power Company (1925), Superior Water, Light & Power Company (1925), Northwestern Electric Company (1925), The Washington Water Power Company (1928), and the Montana Power Company (1928). *51/*

Through the issuance of its securities in exchanges to acquire control of the companies enumerated above and through sale of securities to the public for cash, the capitalization of American grew from the initial $8,000,000 in 1909 to $263,101,529 twenty years later. Much the greater part of this growth took place during the years 1923 to 1929,

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51/ In the earlier years, most of American's subsidiaries were organized by it as an amalgam of groups of smaller companies. Commencing in 1925, however, American began to purchase the control stocks of established utilities, paying increasingly high prices therefor. This was particularly true where American found it possible to acquire control of established operating companies through the issuance (in exchange) of its own preferred stocks. Two outstanding instances of the practice last mentioned are the acquisition by American in the year 1928 of the common stocks of The Washington Water Power Company and The Montana Power Company discussed *infra*.

and is attributable largely to the issuance of American's preferred stocks in exchange transactions. *52/* During the same twenty-year period, consolidated assets of American and its subsidiaries expanded from approximately $9,800,000, to $754,129,787.

To refer to American's having "acquired control" of subsidiaries or of having "issued securities" is, however, apt to be misleading. Despite the activity and vitality which are suggested by the record of expansion outlined above, American possessed no organizational identity of its own during most of its existence. Like National, whose history we have elsewhere described, *53/* organizationally American was scarcely more than a set of books in Bond and Share's office.

For some years after the formation of American, Bond and Share apparently contemplated that the subholding company might be permitted to build up a partial organization of its own, as had earlier been done in the case of American Gas and Electric Company. *54/* American paid

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52/ During the period 1923-1929 referred to above, American issued a total of $164,000,000 of its preferred stocks in exchange transactions, including the transactions referred to in n. 51, above.

53/ Holding Company Act Release No. 2962 (9 S.E.C. 978).

54/ As we pointed out in our Findings and Opinion in Matter of American Gas and Electric Company (Holding Company Act Release No. 2749) unlike the other four subholding companies of the Bond and Share system, American Gas and Electric has always had its own management staff. We pointed out that American Gas was the first holding company to be organized by Bond and Share, and that it was organized in 1906 shortly after the formation of Bond and Share, at a time when the latter had not developed its own service and management staff. The record of that proceeding indicates that American Gas and Electric Company was permitted to retain its own operating staff because the work of that staff was satisfactory and its personnel had won the confidence of Mitchell. We quoted the testimony of G. N. Tidd, President of American Gas and Electric, to the effect that "if you once got Mr. Mitchell's confidence, why he would let you run it".

all or a portion of the salaries of its officers, *55/* and had a staff which included a few bookkeepers, accountants, traveling auditors, and clerks. All engineering services were from the outset, however, purchased from Bond and Share.

In 1917 such employees as American had were entirely dispensed with, and the books and records of American were turned over to Bond and Share's employees. Thereafter, all officers of American were employees of Bond and Share paid exclusively by it, *56/* and all activities performed for, or in the name of, American were performed by employees of Bond and Share. This new arrangement was formalized by the execution of a service contract between American and Bond and Share which provided that Bond and Share would "take charge under your direction (*sic*) of the management of your Company, its present Holding Companies *57/* and the management and development of all Subsidiaries. . ."

Thus, from May 1917 until November 1935, American did not have a single employee of its own and was wholly under Bond and Share's dominion. Despite the fact that as American's capitalization increased Bond and Share's pro-

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55/ Mitchell, as Chairman of the Board was paid approximately $12,000 per year by American, while his compensation directly from Bond and Share ranged from $40,000 in the earlier years to $250,000 in 1928, the last year in which this arrangement remained in effect.

56/ Annual payments continued until 1929 to be made, however, in the name and for the account of American, to Mitchell, as Chairman of the Board, and to the Presidents of four of American's operating subsidiaries. Subsequent to 1929 this practice was discontinued.

57/ Reference is had to Southwestern Utilities Corporation and Southwestern Power & Light Company, two holding companies which Bond and Share had organized in 1912 in connection with its activities in Texas; control of these holding companies was transferred to American by Bond and Share. Both companies were later dissolved, their subsidiaries becoming direct subsidiaries of American.

portionate interest therein (small as it was to begin with) shrank sharply, Bond and Share continued throughout the years to enjoy as complete control of American and its subsidiaries as though it possessed an exclusive proprietary interest. *58/*

Some of the expedients resorted to by Bond and Share to safeguard its tenuous voting control position in American during the period of the latter company's expansion are interesting as examples of the holding company's practices and significant as bearing on the manner in which the present distribution of system voting power was created. From the inception of American in 1909 to the present time, the record indicates only one instance in which Bond and Share made any contribution to the capitalization of American. That instance related to the conversion by Bond and Share in 1923 and 1924 of $1,182,400 principal amount of convertible debentures of American into the company's common stock. The conversion was made at the equivalent of $100 per share for the common stock, at a time when the market price of the stock was considerably higher. *59/*

58/ To be sure, it has been argued that the control of American's affairs by Bond and Share's employees was theoretically subject to the overriding control of American's Board of Directors. However, the record indicates that up to November 1935, American's Board of Directors never included less than 8 persons affiliated with Bond and Share out of a total of 11, a minimum representation of more than 70%. The record further indicates that American having been incorporated under the laws of Maine, all stockholders' meetings were held at Augusta, Maine in the offices of Maine attorneys, who acted as statutory clerks for most of the Maine corporations in the Bond and Share system, and that consequently, stockholder attendance at such meetings was for the most part entirely lacking and at all times wholly negligible. The record indicates no instance of any sort of proxy contest or any challenge to the Bond and Share management control.

59/ In 1916 Bond and Share had participated with Bonbright and others in an underwriting of $6,984,300 principal amount of 6% debentures of American, which debentures were convertible

By reason of American's continued expansion through the issuance of its preferred stocks before the end of 1922 the number of shares of preferred stock outstanding, and consequently the aggregate voting power of the preferred stock as a class, came to exceed that of the common stock. In 1923 the practice was adopted of having American issue additional shares of common stock as dividends on its outstanding common stock. Stock dividends were issued every year from 1923 to 1930 in increasing amounts, *60/* thereby augmenting the voting power of the common stock relative to the preferred.

In October 1924, the common stock was changed from par value to non-par stock and split ten shares for one. Although the notice of the special meeting of stockholders at which this action was taken made no mention whatever of voting rights or voting power, the effect of this split was to reduce the voting power of the preferred stock as a class from 53% to 10.1% and to increase that of the common

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into common stock of American at the equivalent of $100 per share. Bond and Share acquired $1,182,400 principal amount of such debentures at a cost of $1,086,569, without taking into account fees and commission received. The market price of American common during the period of conversion ranged from $145 per share low in 1923 to $695 High in 1924 (giving effect to 10 for 1 split of common in 1924).

60/ The stock dividends were in addition to substantial cash dividends which were regularly paid on the common stock by American, as shown in the following table:

Year	Cash	Stock	Year	Cash	Stock
1909-1912	—	—	1923	$1,143,933	$ 483,156
1913	$225,256	—	1924	1,438,548	588,648
1914	302,476	—	1925	1,585,656	637,641
1915	328,216	—	1926	1,664,352	668,526
1916	328,216	—	1927	1,792,060	726,248
1917	336,827	—	1928	1,930,090	3,338,832
1918	348,216	—	1929	2,225,327	3,922,954
1919	348,216	—	1930	2,551,048	4,486,154
1920	348,216	—	1931	2,916,522	1,454,584
1921	348,216	—	1932	1,501,961	—
1922	632,423	—	1933-1941	—	—

stock from 47% to 89.9%. Upon Bond and Share its effect was to increase the voting power of the block of common owned by Bond and Share from the 12.6% to which it had declined, *61/* to 24.1%. *62/*

61/ At the inception of American, the 16,211 shares of common acquired by Bond and Share had constituted 20.3% of the total capitalization of American, and carried a like percentage of voting power. As American's capitalization increased, however, the ratio of Bond and Share's securities had declined both as respects capitalization and voting power. By the end of 1922, Bond and Share's holdings of common equaled only 10.1% of capitalization and 11.3% of voting power.

62/ As earlier stated, it was contended by respondents that the fairness of voting power distribution in the system can not be evaluated except in light of the circumstances and manner of creation of such distribution. In this connection we note the record indicates that similar steps were taken from time to time throughout the Bond and Share system when the voting control of the securities owned by the holding company was threatened. For example, in our *National* Opinion (Holding Company Act Release No. 2962), we described the effect of the split-up of the Houston Lighting & Power Company and Pennsylvania Power & Light Company common stock on the relative voting strength of the publicly-held preferred stock and the common stock owned by National. Other instances of like character occurred in other companies in the American and Electric systems, as shown by the following table:

Date	Company	Percent of voting power prior to common stock split		Percent of voting power after common stock split	
		Preferred	Common	Preferred	Common
1923	Dallas Power & Light Company (El)*	42.9	57.1	16.7	83.3
1926	Nebraska Power Company (A)	53.3	46.7	5.4	94.6
1927	Utah Power & Light Company (El)	42.4	57.6	6.8	93.2
1928	Kansas Gas and Electric Co. (A)	68.9	31.1	18.1	81.9
1928	Portland Gas & Coke Company (A)	64.5	35.5	14.2	85.8
1930	Pacific Power & Light Company (A)	50.1	49.9	5.5	94.5

* Symbol (El) designates Electric as holding company parent, sym-

At the beginning of 1928, Bond and Share held 458,462 shares of American common stock out of a total of 1,871,091 shares outstanding, or 24.5%. These shares had cost Bond and Share a total of $1,376,365, or approximately $3 per share. *63/* At that date the capitalization of American was in excess of $97,150,000, and total consolidated assets of American and subsidiaries aggregated $537,108,955.

During 1928 a further sharp expansion took place in the capitalization of American incident to the acquisition of control of The Montana Power Company and The Washington Water Power Company. To achieve control of these two prominent utilities, American issued $153,333,620 of its own preferred stock in exchange for their outstanding common stocks, although the book value of the purchased securities (including surplus) aggregated less than $84,000,000. Moreover, in the case of The Montana Power Company, the record indicates that the common

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bol (A) designates American as holding company parent. In each of above cases the holding company owned more than a majority of the common stock, the preferred stock being owned by the public.

It must be borne in mind, as we also pointed out in our *National* Opinion, that despite the significance of transactions such as those enumerated above, in most cases the most important factor in creating the unfair distribution of voting power in the system was the prolific use of the "write-up" technique. By writing up the property accounts of the operating companies, book values were stated against which capital stock was issued to the holding companies, carrying voting control of the respective companies. (See n. 50 *supra* and discussion below.)

63/ This figure is comprised of the $1,086,570 applicable to the debentures converted into common stock in 1923 and 1924; $83,992 applicable to securities exchanged for American common in various transactions; and $205,804 applicable to market purchases prior to 1928. A table showing the cost and manner of acquisition by Bond and Share of American's common stock before and after 1928 is set forth as Appendix G of this Findings and Opinion.

stock of $49,633,300 was substantially if not entirely balanced by inflation. *64/*

Beginning in 1928 Bond and Share made purchases of substantial amounts of American common on the open market for cash. These purchases were increased after the market crash in 1929; in all, a total of 105,700 shares were purchased for the aggregate amount of $8,025,136, or an average price of about $76 per share. *65/* One effect of these purchases was to bolster Bond and Share's voting control position in America, which had been greatly weakened by the issuance of the huge amounts of preferred stock in The Washington Water Power and Montana Power deals.

Since the open market purchases by Bond and Share contributed no capital whatever to American's treasury, it is evident that in appraising the role of Bond and Share as a capital-supplying medium for American, significance can be accorded only to the approximately $1,000,000 paid for the debentures of American later converted into common stock. This sum scarcely looms large in relation to American's total capitalization of $260,428,677 (December 31, 1941).

64/ It is evident that these two improvident purchases, motivated apparently by an unreckoning determination on the part of Bond and Share to increase the contours of its system, have contributed greatly to American's present financial difficulties. Dividend requirements on American's preferred stock issued in these transactions equals $8,221,573 per year. This sum exceeded by $1,200,000 American's total net income after bond interest and other charges in 1941, and was equal to more than 260% of total income received by American from the aforementioned two companies in 1941.

65/ In addition, Bond and Share acquired in October 1929, through its merger with Electric Investors, Inc., 68,704 shares additional of American common, most of which had been acquired by market purchases or as stock dividends. (See Appendix G.)

Commencing in 1932 payment of dividends on American's preferred stocks, 97% of which are owned by the public, was curtailed and arrearages began to accumulate. Although such arrearages of preferred dividends have mounted steadily every year and are still mounting, Bond and Share has continued in full control of American by virtue of the absence from the company's charter and by-laws of any provision for increased voting power or other protective features for the preferred stocks when dividends are in arrears. *66/*

C. *Electric*

1. Organization

Electric was organized by Bond and Share in March 1925; like American, it was chartered under the laws of the State of Maine.

In the 16 year interval between the organization of American and Electric, Bond and Share had made diligent use of the subholding company device in the American pattern. In 1912 it had organized the Utah Securities Corporation, a holding company which acquired various properties principally in Utah and Colorado and transferred them to a newly formed operating company called Utah Power & Light Company. In the same year, it organized Southwestern Utilities Corporation and Southwestern Power & Light Company, holding companies through which various Texas properties were transmitted to Texas Power & Light

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66/ Such provisions have been uniformly omitted from the charters and by-laws of all companies of the Bond and Share system. The charters are drawn so as to give the greatest measure of latitude and protection to the controlling interests; for example, express waiver is uniformly made of stockholders' preemptive rights and the directors are given the power to authorize the issuance of additional stock and perpetual option warrants to such persons and at such prices as they deem fit.

Company, Texas Electric Service Company, and Texas Public Utilities Corporation. In 1914 Bond and Share organized National Securities Corporation (reorganized in 1919 as Power Securities Corporation) which acquired control of properties transferred to Idaho Power Company; and in 1917, it organized Lehigh Power Securities Corporation through which Pennsylvania Power & Light Company was formed. 67/

Each of the aforementioned holding companies was organized and financed in substantially the manner previously described for American; namely: assets were placed on the books of the subholding companies at sums considerably in excess of their cost to Bond and Share and its associates in the particular venture (the "syndicate"); the subholding company would then issue to Bond and Share and associates senior securities (either notes or preferred stock) in a face amount more than sufficient to cover the cost of the assets turned over to the subholding company, and would also issue substantial amounts of common stock (having a majority of total voting power) against the company's inflated investment account. Bond and Share and associates would sell to the public the senior securities plus a bonus of common stock, for the approximate face amount of the senior security, thereby recouping all cash outlays; the promoters would then be left with substantial blocks of common stock at no cash cost (sometimes indeed with a cash profit) which they would divide among them-

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67/ In addition to the subholding companies name above, in 1922, Bond and Share organized the original National, in the manner and for the purposes previously described by us in our *National* Findings and Opinion (Holding Company Act Release No. 2962), and in 1923, it organized American & Foreign Power Company, Inc., as a holding company to consolidate its investments in foreign lands.

selves, the lion's share always going to Bond and Share as "manager" and promoter of the venture. *68/* Thus, Bond and Share would emerge with a substantial block of voting stock at no cost, and complete control of the new corporation (and its subsidiaries) assured through the concentrated voting strength of its common stock holdings and the execution of Bond and Share's standard "service contract" whereby Bond and Share employees "officered" the company, formed more than a majority of its board, and "took over the management of the company and its subsidiaries". *69/*

As a corollary to this method of financing the subholding companies, there also invariably resulted a serious inflation in the accounts of the operating company subsidiaries which were set up. Since the assets received at organization by the subholding companies were generally entered in their book accounts at inflated figures, they were transferred by the subholding companies to the operating companies at sums embodying at least an equivalent amount

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68/ In addition to the amounts of stock which Bond and Share would receive as a syndicate participant in each of the instances named above, Bond and Share also received substantial amounts of bonus stock "for risks and services." In the Southwestern Utilities venture, it received 5,000 shares ($500,000 par value) for "risks and services"; in the Utah Securities venture, it received 25,000 shares ($2,500,000 par value) of which it distributed a portion to associates; in the National Securities venture, it received 20,000 shares ($2,000,000 par value); and in the Lehigh Power Securities Corporation venture, it obtained 40,000 shares for "risks and services."

69/ In the case of Utah Securities Corporation and Lehigh Power Securities Corporation, the syndicate agreement also provided for the deposit of all common stock in a voting trust, "the duration of such voting trust and the provisions of such voting trust agreement to be determined by Electric Bond and Share". A voting trust agreement covering a five-year period was also employed in connection with Southwestern Utilities Corporation.

of inflation and sometimes a greatly increased amount. *70/* In this way there was passed over to the consumer the burden of supporting the watered capitalization of both operating company and the subholding company, while the public investors in the securities of the operating company and the subholding company who may have purchased their securities in reliance on balance sheets containing serious inflation were not informed thereof. *71/*

70/ Thus, in connection with the formation of Texas Power & Light Company in 1912 as a subsidiary of Southwestern Utilities Corporation formed at the same time, securities which had cost Bond and Share a few months earlier $2,300,000 (including all expenses and interest on the sums expended) were transferred to Texas Power & Light Company for $10,550,000 par value of securities of that company, thus creating an initial inflation of more than $8,250,000 in that company's property account. Subsequent inter-system transactions resulted in further inflations of Texas' plant account in an amount which the record indicates presently exceeds $19,000,000. Similarly, in connection with the organization of Utah Power & Light Company, securities which had been assembled by Bond and Share at a cash cost of $14,700,000, and turned over to Utah Securities Corporation, were transferred to Utah Power & Light Company from 1912 to 1915 for securities of the latter and other considerations exceeding $47,000,000, thus creating an inflation of approximately $32,300,000 in the plant account of the Utah Power & Light Company. The senior securities of the operating company were then sold by the subholding company to the public for cash, leaving the subholding company with the entire issue of common stock ($30,000,000 par value) at no cost. See also our notice and order for hearing in *Pennsylvania Power & Light Company et al.*, Holding Company Act Release No. 2906, containing allegations to the effect that Lehigh Power Securities Corporation inflated the plant account of Pennsylvania Power & Light Company in a sum apparently exceeding greatly the entire common stock and surplus accounts of that company.

71/ In addition to serving as instrumentalities through which Bond and Share was enabled to obtain control of vast assets with little or no investment, the subholding companies also played a very important role in the *mechanics* of inflating the plant accounts of the operating companies. As a result of the intricate three-cornered transaction between Bond and Share, the subholding companies and the operating companies, it was frequently rendered impossible for regulatory bodies, let alone investors, to

The organization of Electric in 1925 involved the largest subholding company financing which had been undertaken by Bond and Share up to that time and constituted in as and other respects Bond and Share's most important subholding company venture. *72/*

In substance, the plan of organization contemplated that

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determine the extent or the manner of inflation on the books of the operating companies. This problem was rendered particularly acute by the circumstance that the records of the subholding companies were usually located outside the jurisdiction of local regulatory bodies. Even as to federal regulatory bodies, investigation was frequently hampered by the "unavailability" of key records of the subholding companies, as is established by the experience of the Federal Trade Commission and our own experience in the present proceeding as disclosed by the present record. Exhibits in evidence in the present proceeding establish that Bond and Share consciously employed the subholding companies to "scramble," and render obscure to regulatory bodies, transactions affecting the accounts of operating companies (see Holding Company Act Release No. 2940, issued in the present proceeding, for further discussion of this point).

Also not to be lost sight of is the fact that the existence of the subholding companies facilitated the realization of substantial inter-company profits for the holding companies by reason of the numerous transactions between them and the operating companies.

72/ Financing of Electric involved the sale of $40,000,000 of first preferred stock and $12,000,000 of second preferred stock, plus the issuance of $39,245,100 stated value of common stock, all as described hereafter. Initial financing of the other subholding companies is shown below:

	Securities Initially Sold for Cash	Total Initial Capitalization
American Power & Ligh Company	$2,500,000	$8,000,000
Southwestern Utilities Corporation	10,000,000	20,600,000
Utah Securities Corporation	25,000,000*	26,001,000*
National Securities Corporation (Power Securities Corporation)	3,039,000	9,739,000
Lehigh Power Securities Corporation	18,405,900	20,405,900
National Power & Light Company	2,104,348	21,082,260

* Amount of notes subscribed, of which only a portion of these were issued.

Electric would acquire at the outset two "baskets" of assets: (1) the assets of Utah Securities Corporation, a subholding company controlled by Bond and Share whose principal assets consisted of the entire outstanding common stock, and some shares of the preferred and second preferred stocks, of Utah Power & Light Company; (2) various securities owned by Bond and Share constituting control blocks in the following companies: Power Securities Corporation, a subholding company which controlled Idaho Power Company; Dallas Power & Light Company; Dallas Railway Company; Texas Interurban Railway Company; and New Orleans Public Service Inc.

The assets of Utah Securities Corporation were acquired through the assumption by Electric of all the liabilities of that company and the issuance by Electric of 4 shares of its common stock, plus $10 in cash for each share of common stock of Utah Securities Corporation. As there were 307,751 shares of Utah Common outstanding, Electric issued 1,231,004 shares of its common stock having a stated value of $30,775,100 ($25 per share) and $3,077,510 in cash. The securities owned by Utah Securities Corporation had been carried in the investment account of that company immediately prior to the foregoing transaction at $3,854,263; *72a/* after giving effect to adjustments to reflect other assets received and liabilities assumed, it appears that Electric paid $33,373,343 for these securities and entered them in its investment account at such amount, or $29,519,080 in excess of the ledger value on the books of Utah.

In effecting the acquisition of the second basket of securities from Bond and Share, Electric paid Bond and

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72a/ From evidence in the record, it appears that the system cost of these securities may have been close to nothing.

Share through an intermediary *73/* $25,448,512 in cash, released a claim against Bond and Share for $440,564, *74/* and issued to Bond and Share 310,000 shares of Electric's common stock having a stated value of $7,750,000, and 800,000 perpetual option warrants to purchase additional Electric common at $25 per share. Thus, Electric paid the equivalent of $33,639,076 for this basket of securities, (according nothing to the 800,000 option warrants) and entered them in its investment account at this amount. Since the cash cost to Bond and Share had been approximately $19,390,385, *75/* the amount so paid and entered

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73/ It apparently was the practice of Bond and Share and the subholding companies, whenever they desired to engage in a transaction with an affiliate, to employ a dummy, referred to as an "intermediary," who would enter into agreements with both principals. In connection with the formation of Electric, an intermediary named Lucien W. de Buys was employed. De Buys also served as intermediary in connection with the formation by American of its subsidiaries, Minnesota Power & Light Company and Florida Power & Light Company. Witnesses for the respondents testified that they were ignorant as to the identity of de Buys. Subsequently it was ascertained from a former vice-president of Bond and Share that de Buys was an impecunious art dealer befriended by this vice-president and accorded the privilege of gaining small sums by signing the intermediary agreements and acting as the intermediary in these transactions. Apparently, one of the principal purposes of the intermediaries was to render obscure to outside eyes transactions in which they served.

74/ It was discovered that in the process of collecting service fees from its subsidiaries, Bond and Share collected the same fee from both Utah Securities Corporation and Utah Power & Light Company, and it was therefore arranged that Bond and Share should repay Utah Securities Corporation the $440,564 sum mentioned above.

75/ This cost was as follows:

Securities of the Dallas Companies	$6,214,091
Securities of Powers Securities Corp.	654,682
Common Stock New Orleans Public Service Inc.	12,521,612
Total	$19,390,385

by Electric was $14,248,691 in excess of the cost to Bond and Share. These securities had for the most part been owned by Bond and Share less than 2 years. *75a/*

The plan contemplated that the money needed by Electric to carry out the acquisition of the aforementioned securities would be obtained through the issuance and sale of 400,000 shares of $7 cumulative preferred stock and 120,000 shares of cumulative second preferred stock. A syndicate was organized by Bonbright & Co., which marketed the 400,000 shares of $7 preferred stock to the public at $100 per share, each such share carrying a bonus of 1/2 share of common stock furnished by Bond and Share. For this service, Electric paid Bonbright $2,400,000 or $6 per share of preferred stock marketed. *76/*

The foregoing securities were carried on the books of Bond and Share at a ledger value of $21,185,343, due principally to changing to investment account of $1,396,577 on account of certain stock dividends received from New Orleans Public Service Inc.

75a/ Although Bond and Share had a small investment in the Dallas Companies from 1917 on, the greater portion thereof was received in 1923 by acquisition from Bond and Share's parent, General Electric Company. Bond and Share's investment in New Orleans Public Service Inc. was initially acquired in 1923 at a cost of approximately $4,000,000 through a reorganization. Since the New Orleans Company had a top-heavy debt structure which made impossible the sale of additional senior securities, in 1924 Bond and Share purchased additional common stock in the amount of $7,500,000, after obtaining consent from the New Orleans City Council for an increase in the common stock dividend rate from 8% to 9%.

It is thus evident that almost all of Bond and Share's investment in the basket of securities transferred to Electric had been incurred within the preceding two years.

76/ The fee paid to Bonbright was higher than appears on the surface, by reason of the fact that Bonbright's contract provided for obtaining subscribers on the basis of a 40% down-payment, and the balance payable in installments on call over a minimum period of 30 months commencing January 1, 1926. Payment of the $2,400,000 fee was made to Bonbright upon

The 120,000 shares of $7 cumulative second preferred stock were subscribed to by Bond and Share at $94 per share. Bond and Share immediately resold 110,520 shares in blocks of 1 share of second preferred, 1/2 share of common, and 4 option warrants for $94 per block, 77/ to a selected group consisting of officers, directors, and employees of Bond and Share "and to other persons, firms and corporations that might prove helpful to the Electric Bond and Share Company and the new company".

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delivery of the subscriptions accompanied by the 40% down-payment, and Bonbright undertook no liability with respect to subscriptions on which future payment was not made. Thus, Bonbright earned its $2,400,000 fee on delivery of the $16,000,000 down-payment; on such basis the fee equaled 15% of the gross proceeds received by Electric. It was claimed, however, that in fact most of the subscription were actually paid up in full. As had previously been indicated the relations between Bonbright & Co. and Bond and Share were very close throughout the entire period of Bond and Share's existence. Bonbright & Co. was associated with Bond and Share in most of the latter's important ventures, commencing with the organization of American Gas and Electric Company (1906), American (1909) and continuing through the years. In 1913 Bond and Share purchased stock in Bonbright & Co. which it retained until 1922. At the same time S. Z. Mitchell personally purchased an interest in the Bonbright Company, and became a member of its board of directors. Similarly, members of the Bonbright firm were on the boards of directors of a number of Bond and Share Companies.

In 1923 Bond and Share participated with the Bonbright and Morgan interests in the formation of American Super Power Corporation, and later was associated with those interests in the formation of the Commonwealth & Southern Corporation and The United Corporation.

77/ The option warrants provided for the purchase without time limitation of common stock at $25 per share, or the surrender of four warrants and one share of second preferred stock for four shares of common. This convertible second preferred stock was sold only to persons on the Bond and Share "Select" list. In the same year in which the stock was issued, Electric common sold at a high of $40 1/8 per share; in succeeding years it sold at increasingly high prices, finally reaching a high of $103½ per share in 1930.

The outcome for Bond and Share of the organization and financing of Electric was successful beyond all previous similar ventures. For its holdings of Utah Securities Corporation common stock (59,193 shares) representing a cost to Bond and Share of $618,123, it had received $561,930 in cash and 224,772 shares of Electric common. *78/* For

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Bond and Share also obtained from Bonbright at $94 net a block of 50,000 shares of the $7 preferred stock which Bond and Share thereupon made available to "insiders."

The use of a similar "Select" list is found in connection with each of the subholding companies formed by Bond and Share, and it is noteworthy that principal officers of the company always headed each such list with the largest allotments. Generous treatment of "insiders" also took the form of payment by Bond and Share of increasingly large bonuses to Mitchell and other officers. In 1929 there was adopted a special stock purchase plan for officers and "key men" (the Chairman of the board and the President heading the list) whereby those designated were permitted to subscribe to substantial amounts of Bond and Share common at $40 per share to be paid for over a period of seven years. In that same year, the market price of the stock rose to a high of $189 per share. In 1931, however, when the market price of the stock dropped to $15 per share, the directors voted to cancel the program and refund all sums paid by the participants.

78/ As was true in each of its subholding company situations, Bond and Share owned only a minority stock interest in Utah Securities Corporation, equal to approximately 18% of the total capital stock outstanding. However, the familiar pattern of complete Bond and Share dominion is found viz: a "Service contract" pursuant to which all officers of Utah were employees of Bond and Share, and Utah's books and records were kept in Bond and Share's offices by Bond and Share's employees; almost the entire board of directors and the entire executive committee were composed of Bond and Share officers, directors or associates. In addition, a voting trust for the common stock of Utah had been established at the time of the company's organization in 1912, with three of the five trustees affiliated with Bond and Share.

The record in the present proceeding further indicates that persons and companies affiliated with Bond and Share owned substantial amounts of Utah Securities common at the time of the exchange for Electric; e.g. Mitchell, 11,400 shares, Groesbeck, 2,600 shares, Breed 695 shares, Electric Investors (an affiliated investment company later consolidated with Bond and

its basket of other securities transferred to Electric having a cash cost of $19,390,385 it received the equivalent of $25,889,076 in cash plus 50,000 shares of common stock and 353,408 option warrants to buy additional common at $25 per share. Through the various transactions in connection with Electric's organization, Bond and Share acquired an additional 23,569 shares of common at a cost of $36,216 or $1.53 per share. In total, Bond and Share emerged with 298,341 shares of common and 353,408 option warrants at no cost, *79/* 9,480 shares of second preferred stock at a cost of $854,904, and a net cash profit of approximately $6,500,000 on the securities surrendered to Electric, most of which had been held less than two years.

Not only did Bond and Share acquire its entire initial common stock investment in Electric at a cost of approximately minus $6,500,000, but in customary fashion it also emerged with complete control of the new company. The securities acquired by Bond and Share carried approximately 16% of the total voting power, and substantial additional blocks were in friendly hands. *80/* Moreover, as a condition of the sale to Electric of the basket of securi-

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Share) 7,800 shares, Electric Securities Corporation 927 shares, E. K. Hall 1,000 shares, E. W. Hill 747 shares, Alfred L. Loomis and Langden K. Thorne (Bonbright & Co.) 1,400 shares.

79/ The market value of this block of common stock and options at the high in each of the years 1925 to 1930 inclusive, was as follows:

	Common	Options	Total
1925	$11,970,933		
1926	10,292,764	$ 2,827,264	$13,120,028
1927	9,658,790	5,301,120	14,959,910
1928	14,730,587	10,911,472	25,642,059
1929	25,843,789	21,822,944	47,666,733
1930	30,878,293	27,610,000	58,488,293

80/ At the end of 1928, various interests affiliated with Bond and Share owned at least 150,000 shares equal to approximately 6% additional of the total voting power.

ties previously described, Bond and Share required that Electric enter into the standard Bond and Share "service contract" by virtue of which Electric was officered exclusively by Bond and Share employees, its books and records kept in Bond and Share's offices, and consequently with Bond and Share in exclusive dominion of Electric and its affairs, "subject at all times to the control of the board of directors". Said board of directors, however, consisted almost entirely of officers or directors of Bond and Share and affiliated companies, with S. Z. Mitchell as its chairman. *81/*

81/ Not only did the service agreement provide that Electric would be serviced by Bond and Share, but it also provided that if any of Electric's subsidiaries did not enter into service agreements with Bond and Share, Electric would itself pay Bond and Share in any event for "servicing" such subsidiaries. Apparently this clause was drawn with reference to the fact that the local authorities in Dallas and New Orleans had consistently refused to approve the payment by Bond and Share's subsidiaries of these "service" fees. As a result, Electric was obliged to pay Bond and Share the fees for these companies until 1935. In that year, it seems the Dallas and New Orleans authorities withdrew their opposition, apparently in reliance on the newly enacted Public Utility Holding Company Act with its safeguards as to service arrangements.

While the service contracts which Bond and Share demanded (and received) of all subholding companies and their subsidiaries have been referred to herein primarily as control media for Bond and Share, it must not be overlooked that they also constituted a highly important and lucrative source of revenue for Bond and Share. In fact, the record indicates that for the years 1925 to 1935 inclusive, income from service operations constituted the largest single source of income for Bond and Share. It also appears that profits on such operations in certain years exceeded 250% of cost.

The fees paid by the operating companies to Bond and Share, including the aforementioned profits, were either charged by the operating companies as operating expenses or were capitalized in plant accounts.

It is interesting to note that at the end of 1928, when revisions in the service contracts were under consideration among Bond and Share executives, one of the attorneys who appeared of counsel for Bond and Share in the present proceeding but who

It is not without interest to consider against the background of the foregoing facts, the statement made by S. Z. Mitchell to the board of directors of Bond and Share in

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was at that time an officer of a subsidiary urged in a letter to Bond and Share the use of more guarded language in the service contracts. He said:

> "This paragraph expressly contemplates that the holding company, which of course has control of the operating subsidiary, shall procure that subsidiary to make a service contract with the Electric Bond and Share Company. This destroys the theoretical freedom of action of the local operating company, which it seems to me is an important point in the investigation of these contracts by local public service commissions. We have always stressed the point in discussion of these matters before local commissions that these contracts are voluntarily entered into after full discussion by the local boards of directors as being for the best interests of the local companies; that they are terminable at will by those local companies, and that they constitute an asset of value to those companies for which the compensation is justified, and without the payment of which compensation by the local companies the services of the Electric Bond and Share Company could not be obtained.
>
> "This paragraph of the proposed contract while it does not so state leaves it clearly open to inference that the holding company will see to it that the operating company makes such a contract. The holding company will obviously do so in its own interest because otherwise—while in form it is optional—it would doubtless be required to itself assume the payments to be made by the operating company in order to secure those services for that company. . . .
>
> "I assume that this holding company contract will become virtually public property, either through the Federal Trade Commission investigation, or otherwise, and may in that way come to the potential notice at least of all local public utility commissions. It is for this reason that I think it quite important that the holding company contract should be divorced as completely as possible from the operating company contract so as to relate solely to the services rendered to the holding company, which do not involve the operating company in any way, and thus not become the subject of inquiry, explanation, or justification, in local investigation."

recommending the plan which was followed for the formation and financing of Electric, as it appears on the minutes of the board:

> "The Chairman referred to the holdings of this Corporation in Power Securities Corporation, New Orleans Public Service Inc., Dallas Power & Light Company, Dallas Railway Company and Texas Interurban Railway, stating that they had been acquired for the most part in connection with reorganizations of operating utilities with the view of eventually vesting them in some holding or investment company somewhat in the manner followed in the case of American Power & Light Company and similar companies. He pointed out that Electric Bond and Share Company, with its limited capital, could not expect to keep as a permanent investment holdings of this character and magnitude and as such holder provide the substantial amount of additional money needed from time to time to expand such operating properties to meet the demands for increased service . . ."

In point of fact, Electric subsequent to the acquisition of control of these operating companies from Bond and Share made no additional investment whatever in any of such companies, with one insignificant exception. *82/* Moreover, if additional money for investment in these properties had actually been needed, the record indicates that Bond and Share not only had large cash funds on hand, but had the

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82/ In 1927 and 1928 Electric purchased from Dallas Power & Light Company 125,125 shares of common stock for $2,502,500. The record indicates that the earnings of the Dallas Company were such that it could readily have sold these shares publicly for a price much higher than that paid by Electric. Moreover, it appears the purchase was made for strategic reasons rather than the needs of Dallas, since the Dallas Company proceeded to lend back the greater part of this money to Electric.

ability to sell, and did sell, hundreds of millions of dollars of its own securities. *83/*

Euphemisms concerning "increased service" for the customers of the operating companies could not, of course, obscure for the directors of Bond and Share Mitchell's meaning when he recommended formation of a new holding company "in the manner followed in the case of American Power & Light Company and similar companies." In essence that necessarily meant formation of a subholding company to serve as an instrumentality through which Bond and Share would recoup its investment in certain securities while retaining dominion over them through control of the new company. When, as in the case of Electric, a large cash profit was also realized, it served to brighten further an already bright picture.

Bond and Share's success in the Electric venture was, of course, not achieved without deleterious consequences to the other participants, and to Electric itself. The new company started off with an investment account stated on its books at $69,900,000, of which $46,655,352 represented writeup over cash cost to affiliated predecessors. *84/* Thus the investment account of Electric was initially inflated to approximately 300% of the aggregate cost to the affiliated

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83/ Between 1925 and 1931, Bond and Share realized $288,580,000 cash from the sale of its own securities. The greater portion of these proceeds was invested by Bond and Share in various foreign ventures revolving about American & Foreign Power Company. Substantial sums were also expended in market purchases of the securities of its subholding companies at and subsequent to the market break of 1929.

84/ We have previously pointed out that the securities owned by Utah Securities Corporation had been on the books of that company at $3,854,263 and the basket of securities acquired from Bond and Share had cost Bond and Share $19,390,385. The total of the foregoing was $23,244,648, as compared with Electric's initial investment account of $69,900,000. As has been noted, even the $3,854,000 on Utah Securities' books may represent "write-up."

predecessors. Per contra, this inflation was represented in the capital account of Electric by an equivalent amount, equal to the sum of the entire stated value of common stock and approximately 1/2 of the second preferred stock. In point of fact, Electric's initial capitalization was approximately 70% "watered." *85/* As a corollary, public investors who paid $40,000,000 for a "cumulative preferred stock" received a security behind which there was no true cushion.

2. Activities of Electric and Relations with Bond and Share Until 1935

Subsequent to the organization of Electric, Bond and Share caused it to undertake two major ventures: (1) acquisition of the Couch properties as the nucleus for the formation of Arkansas Power & Light Company, Louisiana Power & Light Company and Mississippi Power & Light Company; (2) acquisition of natural gas properties in Louisiana and later in Texas, which ultimately led to the formation of United Gas Corporation.

For some time prior to the formation of Electric in March 1925, Mitchell had been conducting negotiations with Harvey C. Couch, who was President of a holding company called The Southern Power and Light Company which owned the control stocks of a number of utility properties

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85/ It was contemplated that Electric's initial capitalization would embrace issuance of common stock having a stated value of $39,245,100, second preferred stock with a stated value of $11,280,000, and first preferred stock with a stated value of $40,000,000, or a total of $90,525,100, against which the inflation was $46,655,352, or 52%. However, as was previously pointed out, Electric actually received only $16,000,000 as a down payment on the first preferred at the outset, the $24,000,000 balance being paid over a period of 2½ years. Electric's balance sheet did not include this $24,000,000 as part of the initial capitalization. Excluding this $24,000,000 would make Electric's initial capitalization only $66,525,100 in respect of which the inflation would approximate 70%.

in Arkansas, Louisiana and Mississippi. *86/* Approximately one month after the organization of Electric, a contract was entered into whereby Electric acquired the assets of The Southern Power and Light Company in exchange for the issuance to the former company of 96,181 shares of the $7 preferred stock and 48,090 shares of the common stock of Electric, having an aggregate stated value on the company's books of $10,820,350. It appears that the securities and the assets acquired from Southern were carried on that company's books at $8,341,548, and that this sum was considerably in excess of the underlying book values of the portfolio securities after elimination of write-ups. *87/*.

Arrangements were made to have Electric acquire from its sister holding company, National, the common stock of Arkansas Central Power Company and other assets in the City of Little Rock, Arkansas, paying National a substantial profit. Sundry other minor properties were purchased by Bond and Share agents in the three states, and thereafter three operating companies named respectively, Arkansas Power & Light Company, Louisiana Power & Light Company, and Mississippi Power & Light Company were organized, to which were transferred the properties located

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86/ The record indicates that associated with Couch in The Southern Power and Light Company were Albert W. Wiggin of the Chase National Bank of New York and John C. Nickerson of the investment banking firm bearing the same name.

87/ For example, allocating the purchase price on the basis of underlying book values, it appears that Electric paid $4,828,000 for the common stock of Arkansas Light & Power Company, the largest company in the group. The record indicates that the book value of the stock after elimination of write-ups was only $1,451,000.

Earnings on the aforementioned stock during the 12 months ended February 28, 1925 were $175,206 after wholly insufficient depreciation charges. Electric thus acquired the stock at a cost equal to 28 times earnings. If depreciation had been charged at the rate of 2% of fixed capital, no earnings at all would have been available for the common stock.

in each of the states. Couch and certain of his former associates in The Southern Power and Light Company were made the principal officers of the three companies.

In payment for the properties conveyed to them by Electric, the three operating companies issued to Electric their own securities having a total ledger value of $70,499,850, of which $34,500,000 was in the form of bonds and $16,000,000 in first and second preferred stocks. Although Electric had made substantial outlays in calling the bonds of the constituent companies and for other interim purposes, the cost of these properties to the three companies was in excess of 135% of Electric's total cost and disbursements of all kinds. *88/* The Plant accounts of the three companies were stated at a sum equal to approximately 144% of the combined plant accounts on the books of predecessor companies and 175% of predecessor plant accounts after adjustment for removal of identifiable inflationary items on predecessors' books. *89/*

Electric sold to the public (through Bond and Share and underwriters) the bonds and first preferred stocks received from the three operating companies, and thereby recovered all its cash outlays and disbursements, leaving it with substantially only its initial investment cost represented by its securities issued to Couch and associates in The Southern Power and Light Company. Electric continued to retain, however, all the common stock and

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88/ Included in the alleged "costs" of Electric were sums advanced by Electric to the predecessor companies for the purpose of paying dividends to Electric, together with interest on such advances.

89/ In dollars this increase in the plant accounts of the three companies aggregated approximately $24,500,000 before removal of inflationary items on predecessors' books, and $34,700,000 after removal of such inflationary items. This excess of $34,700,000 constituted, of course, part of the "property" on which it was expected that the companies would receive a return from ratepayers.

second preferred stock of the three companies having a stated value of $26,500,000 and representing in each case more than 90% of the total voting power. *90/* At the very outset, all three companies were caused to execute service contracts with Bond and Share, and have been "serviced" continuously since that time by Bond and Share and its wholly owned service company, Ebasco Services Incorporated.

In October 1926, approximately one year after acquisition from the Couch interests of the assets of The Southern Power and Light Company, Electric purchased control of

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90/ In electing the boards of directors of the three companies, Electric has always followed the practice of including as directors a number of residents in the territory in which the companies operate. Some of the reasons for this policy are suggested in the letter sent by Couch to Bond and Share shortly after the formation of Arkansas, from which the following is an excerpt:

> "I would have liked to announce the names of our new directors, not that there is any urgent demand for it other than there has been a lot of confusion about the state account (sic) of the exchange of stock certificates, merger, etc., and some talk about rate reduction now since my associates and myself have sold out and New York or foreign interests own the property.
>
> "I really do not know how far sentiment of this kind will affect anything. We try all along to carry the idea that it is a home company trying hard to develop and do something for Arkansas. It was hard to make the investment pay during this growth and we need every bit of the local cooperation possible."

After enumerating the names and qualifications of the individuals recommended, Couch went on to state:

> "You will note that there is a minister included which is quite unusual, but he is very practical, experienced and well acquainted throughout the state. There are some 300 or 400 Methodist ministers in the state and I thought this would be a compliment to all of them and I know they can be quite helpful. He is the type of man that will follow our suggestions and be in accord with everything that we want done and will give us an opportunity to feel the pulse of the public through him."

a holding company named Gas & By-Products Company, which in turn owned the control stocks of a number of companies engaged in various branches of the natural gas business in the states of Louisiana and Texas. To acquire control of this company, Electric issued 23,563 shares of its first preferred and 149,749 shares of its common stock, having an aggregate stated value of approximately $6,000,000. The acquisition of control of Gas & By-Products Company marked the definitive entrance of Electric into the natural gas industry, *91/* and the undertaking of what proved to be its largest and least remunerative investment —the United Gas Corporation.

There are presently pending before us separate proceedings which involve the respective rights and claims of Bond and Share, Electric, and the public security holders of United Gas Corporation, arising out of the organization, financing and subsequent history of the latter company. *92/* Since we shall hereafter be called upon to make definitive findings and determinations with respect thereto, we abstain at this time from a detailed discussion of this complex subject even though the record in the present proceeding contains a substantial body of evidence respecting it. However, in view of the circumstance that this is the only situation disclosed by the present record in which either of the subholding company respondents actually made a

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91/ It appears that Bond and Share's interest in the natural gas industry was stimulated by its association with Couch interests, which prior to Bond and Share's advent had acquired an interest in the large Monroe gas fields in Louisiana and had undertaken the construction there of the Sterlington steam electric station, employing natural gas as the fuel.

92/ Matter of United Gas Corporation, et al, Files Nos. 70-314, 70-315, 59-21, 4-33, Holding Company Act Release No. 2790. There are also pending in the courts various suits brought by stockholders of United Gas Corporation and stockholders of Electric, against Bond and Share and the directors of United Gas Corporation arising out of the facts referred to above.

large cash investment in equity securities. It seems appropriate to discuss briefly the outcome of this venture for Electric. *93/*

United Gas Corporation was organized by Bond and Share in March 1930 as a consolidation of certain natural gas properties already controlled by Electric with other properties controlled by unaffiliated interests. Most of the officers and directors of the new company were persons associated with Bond and Share, and the usual form of service agreement was entered into whereby Bond and Share was in complete charge of the affairs of the company. Operations of the company did not begin until June 1930, at a time when the depression was deepening over the land.

Into this venture Electric was caused to place $60,000,000 in cash, together with certain securities owned by it which stood on its books at approximately $27,400,000. For this investment Electric received second preferred and common stock and option warrants of United. *94/* During the first two years of United's existence, Electric received dividends on the second preferred stock of United in the aggregate sum of approximately $8,000,000. Commencing in 1932 dividends on the second preferred stock were suspended, and since that time Electric has received no further income of any kind on its investment. *94a/*

93/ We have elsewhere summarized the salient features of the United Gas situation, Holding Company Act Release No. 3301.

94/ Electric now owns 884,680 shares (100%) of the $7 second preferred stock, 3,795,086 shares (48.54%) of the common stock, and 3,600,040 warrants (73.99%) to purchase additional common stock at $33 1/3 per share.

94a/ Accumulated dividends in arrears on the second preferred stock on Dec. 31, 1941 aggregated more than $60,000,000. In addition, more than $9,000,000 of dividend arrearages have accumulated on United's $45,000,000 of first preferred stock, 96.16% of which is owned by the public, and 3.84% by Bond and Share.

Of the $60,000,000 cash which Electric was required to pay into United Gas Corporation, $36,000,000 was paid in June 1930 and the balance in 1931. Electric in 1930 sold to the public $31,000,000 principal amount of 5% debentures and $20,000,000 stated value of preferred stock for total net proceeds of approximately $46,000,000. In order to raise the additional $24,000,000 required in 1931 Electric made an offer to its common stockholders to subscribe to additional common stock at $15 a share, which offer Bond and Share underwrote. Only about $1,000,000 was subscribed by public stockholders of Electric through the exercise of their rights and the sum of approximately $20,500,000 was paid in by Bond and Share under its pro rata subscription and pursuant to the underwriting.

There is strong indication in the record that in formulating its plan for the organization and financing of United, Bond and Share sought to set the stage for the customary recoupment by the subholding company of the major part of its investment. This apparently was to be accomplished by the sale or redemption of Electric's holdings of the second preferred stock, leaving it in possession of a control block of United's common stock at little or no cost. However, such public financing was never consummated. Indeed, as stated below, it became necessary for the system itself to supply substantial additional amounts of cash.

The investment of Electric at the organization of United did not actually serve to supply working capital or funds for future development. The greater part of such funds was required, and was indirectly employed, for the original purchase of one of the groups of assets which went into United at organization. The cost of these assets to United was $50,000,000, although they had been carried on predecessor books at approximately $24,000,000. Thus the greater part of the cash investment made by Electric was used, in effect, for the acquisition of control of a going enter-

prise rather than for future development of the new enterprise.

One result of such use of the cash received by United Gas Corporation at organization was to reduce its working capital position to a negligible amount during its early years. As a result, since large amounts were needed for operations and development of the system, the practice of open account borrowing from Bond and Share was resorted to and a very large indebtedness to Bond and Share soon accumulated.

Bond and Share now has debt claims against United of $52,925,000. On this investment Bond and Share is currently receiving a return of approximately $3,000,000 per annum in the form of interest. Interest on the indebtedness has uninterruptedly been paid to Bond and Share at the rate of 6% from the organization of United to the present time. Up to the end of 1941 the total interest thus received by Bond and Share aggregated more than $26,700,000. In addition Bond and Share has received a total of $1,026,106 as dividends on 17,310 shares of United's first preferred stock, and approximately $3,500,000 in the form of service and construction fees from United and its subsidiaries. 95/

By contrast, as stated above, Electric received approximately $8,000,000 of dividends on the second preferred stock of United in the first two years after organization of United, but has received no income whatever since United suspended dividends on its second preferred stock in 1932. Since organization of United, Electric has paid more than $18,000,000 in interest charges alone on the $31,000,000 of debentures issued by it in 1930, as aforementioned. It also

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95/ It is to be noted that in May 1941, United Gas Corporation sought authority from this Commission for the issuance and sale of $75,000,000 principal amount of bonds, from the proceeds of which it proposed to pay Bond and Share its indebtedness in full. This application was consolidated with the proceedings instituted by the Commission, and constitute one of the pending proceedings referred to in n. 92, *supra*.

paid substantial dividends on the preferred stock issued in 1930 until it was compelled to suspend dividends on all of its outstanding preferred stock in 1932. Thus, the foregoing circumstances regarding the organization and financing of United have been a very major factor in the current financial difficulties of Electric and its inability to service its publicly held securities. *96/*

Dividend payments on Electric's first and second preferred stocks were curtailed during 1932, and suspended entirely at the end of the year. *97/* No further dividends were paid on the preferred stocks until 1940. In 1940 and 1941, small payments were made on the $6 and $7 preferred stocks. As of December 31, 1941, arrearages on the first preferred stock totaled $45,757,676, and on the second preferred stock $5,131,649 additional. *98/*

Subsequent to the organization of Electric, Bond and Share purchased no additional securities of Electric directly from it with the single exception in 1931 previously mentioned in connection with Electric's efforts to raise the money for which it was obligated in the United Gas venture. However, in August 1929 Bond and Share had commenced to make substantial purchases of Electric common stock on the open market. These purchases were intensified and increased after the market crash in 1929, and continued during 1930. In all, a total of 260,601 shares of Electric com-

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96/ As is noted below, not only was Bond and Share in control of United Gas Corporation during the occurrence of the events above described, but it also exercised complete dominion over Electric, and Bond and Share employees and officers carried out all the various transactions in Electric's name.

97/ It is to be noted that despite the increasing financial difficulties of Electric, the company declared a dividend of $829,177 on its common stock in 1932, immediately prior to curtailment of preferred dividends.

98/ Set forth as Appendix K is a table showing corporate and consolidated earnings of Electric from 1925 to December 31, 1941, dividends paid and accumulated arrearages, on a yearly basis.

mon were purchased by Bond and Share on the open market for the aggregate sum of $12,759,565, or an average price of $49 per share. *99/* In contrast, the 1,644,203, shares of common stock acquired by Bond and Share directly from Electric at organization and in 1931 cost Bond and Share a net total of $13,632,000 or about $8.30 per share. As shown by Appendix H, additional Electric securities were acquired by Bond and Share as the result of the consolidation and merger of the latter with various affiliated companies which occurred in 1929.

Throughout the years from the organization of Electric until November 1935, Electric, like American, was functionally merely a set of books in Bond and Share's office. All corporate activities performed by, or in the name of Electric, were performed by employees of Bond and Share, and the affairs of the company and its subsidiaries were in all respects under Bond and Share's complete dominion.

D. *Effect of 1935 Organizational Changes in Bond and Share System on American and Electric*

In November 1935, shortly before the effective date of the registration provisions of the Public Utility Holding Company Act of 1935, there was carried out throughout the Bond and Share system the general organizational revision which we have previously described in our *National* Findings and Opinion. As we there related, in connection with the over-all system changes which took place at that time, each of the subholding company respondents was given a complement of officers and employees of its own, *100/* and

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99/ These figures represent the totals of all market purchases made by Bond and Share from the time of Electric's organization to date.

100/ The table set forth below indicates the comprehensive interlocking of officers and personnel which existed between Bond and Share and the subholding company respondents up to

each was assigned a separate suite of offices in the Bond and Share office building. At about the same time the formal interlocking which had theretofore existed between the boards of directors of Bond and Share, the subholding companies and their subsidiaries, was substantially terminated. *101/*

In the case of American, a group of 17 employees of Bond and Share was moved, together with books and records of American, into offices located on the floor above those of Bond and Share. H. L. Aller, who for more than eight years had been a "sponsor" in the service department of Bond and Share, was made president and chairman of the board of American; *102/* L. W. Parkhurst, for a number of

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November 1935, pursuant to the arrangements which have been described in the previous sections of this opinion.

	Bond and Share	American	Electric	National	Subsidiaries of the three subholding companies	
					No. of Offices held	No. of Directorships held
Groesbeck, C. E.	D.-Ch.B.D.	D.-Ch.B.D.	D.-Ch.B.D.	D.-Ch.B.D.	4	6
Inch, S. R.	D.-Pres.	D.-Pres.	D.-Pres.	D.-Pres.	2	5
Sawyer, P. B.	V.P.	D.	D.	D.-V.P.	5	9
Summerson, E. P.	D.-S.	S.	S.	D.-S.	10	2
Lee, E. B.	A.S.	V.P.-A.S.	V.P.-A.S.	V.P.-A.S.	3	–
Ray, A. C.	T.	T.	T.	T.	10	–
Simpson, A.	A.T.	A.T.	A.T.	A.T.	8	–
Hickman, G. J.	A.T.	A.T.	A.T.	A.T.	6	–
Lang, W. C.	Comp.	Comp.	Comp.	Comp.	3	2

101/ An exception was made, however, in the case of Electric and its subsidiary, United Gas Corporation. The directors and officers of Electric have continuously served as the directors and officers of United, and such relationship exists up to the present time. Until April 15, 1941, the two companies shared payments of the salaries of the joint officers but since that date Electric has paid their entire salaries.

102/ A "sponsor" in the service section of Bond and Share was the equivalent of a supervisor over a group of operating companies or over a department. The service section was divided into departments, such as budget department, engineering department, etc., each of which was headed by a sponsor; these de-

years a vice-president of Bond and Share, American, Electric, and National, remained as vice-president of American; D. W. Jack and C. W. Scholz, Bond and Share accountants, were appointed respectively secretary and treasurer, and assistant secretary and assistant treasurer. The remaining personnel comprised several bookkeepers and accountants and a number of stenographers and clerks, each of whom had until that time been an employee of Bond and Share. From November 1935 until the present time, there has been no substantial change as regards either the number or identity of American's personnel.

Prior to November 21, 1935, the board of directors of American consisted of 9 members, of whom 4 were officers, employees or directors of Bond and Share, and 2 others were officers, employees, or directors of other companies of the Bond and Share system. In November and December 1935, pursuant to the general reorganization previously referred to, 6 directors of American resigned and were replaced by new directors, among whom were the 4 newly appointed officers of American and 1 other, making a total

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partments performed work for all serviced companies. In addition, however, there was an operating department which was subdivided into groups on a geographic basic, viz., the Southwest group, Northwest group, North Central, South Central, South Eastern, and United Gas group. Each group was headed by a sponsor who was in charge of the operations of the operating companies located in the geographic area described by the particular group's name, *irrespective of subholding company affiliation*. Thus, for example, the Southwestern group includes Texas Power & Light Company, Texas Electric Service Company, and Texas Public Utilities Corporation, subsidiaries of American; Dallas Power & Light Company, subsidiary of Electric; and Houston Lighting & Power Company, a subsidiary of National.

These same groupings by geographic location without regard to subholding company affiliation carried over to Ebasco Services Incorporated in 1935, and are in use at the present time.

board of 8 members. *103/* The present board consists of 9 members.

In the case of Electric, a group of 14 employees of Bond and Share was moved, together with books and records of Electric and United Gas Corporation, into offices located on the floor above those of Bond and Share and immediately adjoining those of American. Joe H. Gill, who had been associated with the system for more than twenty years and for several years prior to 1935, like Aller, had been employed by Bond and Share as a "sponsor", was made chairman of the board and president of Electric and of United Gas Corporation; E. W. Hill, for many years a vice-president of Bond and Share and each of the subholding companies remained a vice-president of Electric and United Gas; Edgar H. Dixon, a Bond and Share accountant, was made secretary and treasurer; and A. F. Høffman, Bond and Share accountant, was made assistant secretary and treasurer. The remaining personnel included several bookkeepers and a number of stenographers and clerks, all of whom had theretofore been Bond and Share employees. From November 1935, until the present time there has been no substantial change as regards the number or identity of Electric's personnel.

Prior to November 21, 1935, the board of directors of Electric consisted of 9 members of whom 8 were officers, employees or directors of Bond and Share or other system companies. In November 1935, pursuant to the general system reorganization previously described, 7 directors of Electric resigned and were replaced by new directors including four of the company's newly appointed officers. Electric's board has continued to consist of 9 members, of whom at the present time five are officers of the company.

103/ The record establishes that all new directors were selected by Groesbeck and Inch, at that time chairman of the board and president, respectively, of Bond and Share.

At the time the aforementioned changes were effected in the subholding companies, Bond and Share organized Ebasco Services Incorporated a wholly-owned subsidiary, to which was transferred the entire service section of Bond and Share. All of the subsidiaries of American and Electric duly entered into service contracts with Ebasco and have continued to operate under such arrangements up to the present time.

We indicated in our *National* Findings and Opinion that the organizational changes effected in 1935 constituted a futile attempt by Bond and Share, with a view to the immediate impact of the Holding Company Act on the system, to impress on the subholding company respondents something of the character of independent organizations, separate and distinct from Bond and Share, and to impart to them a semblance of function. *104/* It was conceded by witnesses for the respondents that the organizational changes in November 1935 were based on advice of counsel that the newly enacted statute "threatened the existence" of the subholding companies. In summarizing the effect of the 1935 move on National, we stated:

"The effect of the 1935 move was merely to move into

104/ It could scarcely have been hoped that the organizational revision would form the basis for a disclaimer of control by Bond and Share over the subholding company respondents, in light of the long years of intimate relationship between Bond and Share and those who became the officers, employees, and directors of the subholding companies, the servicing arrangements between all the subsidiaries of the subholding companies, and the heavily concentrated voting strength of the securities of the subholding companies owned by Bond and Share. (See n. 129 *infra*.)

Not only have Bond and Share and the subholding company respondents made no claims of non-control by appropriate applications under Section 2 (a) (8) of the Act, but the record in the present proceeding contains specific admissions on the part of counsel and the presidents of the subholding companies that such control by Bond and Share is not denied.

a separate office in the Bond and Share building a group of Bond and Share employees who were to concentrate their time and effort solely on the corporate activities of National. Instead of Bond and Share having, as formerly, a large group of employees in its treasury and bookkeeping departments, all of whom worked on the books of Bond and Share, National and the other subholding companies *pari passu,* one group of such employees was assigned to work on National's books exclusively; instead of being paid as formerly by Bond and Share, they have been paid by National; instead of occupying one large suite with Bond and Share and all its subholding companies, the employees of National occupy a smaller suite in the same building. Nothing more fundamental than this has occurred."

The record makes it plain that the 1935 move resulted, in the case of American and Electric, in changes of a character no more fundamental than in the case of National. The personnel transferred to American, like that transferred to National, is sufficient merely to perform necessary routine activities incident to the functioning of the subholding companies as corporate owners of securities. In addition, the presidents of the two companies endeavor to exercise a measure of proprietary surveillance over the activities of their subsidiaries in much the same manner in which they functioned previous to 1935 as "sponsors" in the Bond and Share service section, but apparently with somewhat greater authority.

The record further establishes that there is close and constant contact and coordination between the personnel of the subholding company respondents and the personnel of Bond and Share and Ebasco and that, in effect, the personnel of the subholding companies have functioned since November 21, 1935 as subsidiary and complementary

organizations of Bond and Share, possessed of substantially the same outlook, objectives, and loyalties as they had prior to November 1935.

As in the case of National, not only has the 1935 maneuver failed to impart "function" to the subholding companies, but it has resulted in substantially increased expense and duplication of personnel as compared to the period prior to November 1935. As we pointed out in our earlier Opinion, the president of National indicated that because of the increased expenses and decreased efficiency of the present arrangement, he regarded the 1935 revision as something of a nuisance imposed by the Holding Company Act and unequivocally proclaimed that he "would be delighted to go back to the old arrangement".

In our opinion, the ineffectual 1935 move has significance primarily as an expression of the recognition by the respondents of the vulnerability of the subholding companies to Section 11(b)(2) of the statute. Apart, however, from the transparent superficiality of the revision which was made, we doubt that even changes of the most drastic character in the structures of the Bond and Share system and the subholding companies could have saved the latter from the impact of Section 11(b)(2), because, as we stated in our National Opinion, the subholding companies having been conceived and utilized solely as pyramiding devices in the Bond and Share system, "thus stood squarely within the focus of the statutory intendment".

Although it scarcely seems necessary to emphasize further the narrow role of the subholding companies in view of the historical survey outlined above, it may be noted that in the past respondents themselves have made significant admissions in that regard. For example, the record contains the following testimony given by S. R. Inch, then president of Bond and Share and now president of Ebasco Services Incorporated, before the Committee on

Interstate and Foreign Commerce of the House of Representatives during the pendency of the present Act:

> Mr. Inch: "The Electric Bond and Share Company plan has been developed on the idea that its associated holding companies *are merely investment companies* through which equity money could be raised for the financing of the operating subsidiaries.
>
> "These associated holding companies have no payrolls, receive no fees, hold no outside investments, and *serve no functions* except the very important ones of providing the equity money for, and the cash needed from time to time by their own operating subsidiaries."
>
> • • •
>
> Congressman Mapes: "Why could not that all be done by the Electric Bond and Share Company?"
>
> Mr. Inch: "It could, except that it was not at that time. I do not know whether it was wise or not; but it has worked, and that is really the test of usefulness of these things. It was thought desirable when that group was done to close it and go on and do another job and *then to get the new investors that might come into that, you see. . . .*" (Italics supplied)

We think that Inch quite correctly summarized Bond and Share's purpose in forming the subholding companies in the single phrase that it was "to get the new investors that might come into that". The historical survey set forth above establishes that Bond and Share formed the subholding companies for the purpose of getting public investors to provide the money to: (1) reimburse Bond and Share, with a profit, for its entire investment in groups of assets, while leaving Bond and Share in undisturbed dominion of these assets and with claims to a portion of their earnings; and (2) acquire control of the greatest possible number of additional properties to which Bond and Share's dominion

would extend. It was this function which the subholding companies preeminently served, and this was the fundamental role of the subholding companies in the development of the Bond and Share system.

As to the claim of Inch that the subholding companies also served the function "of providing the equity money for, and the cash advances needed from time to time by, their own operating companies", our survey of the record has convinced us that such "services" were more apparent than real, and that the subholding companies in fact contributed nothing of substantial value in that regard with one possible exception. *104a/* Since the respondents have insistently urged in the present proceeding, as did Inch before the House Committee, that the subholding companies if they did nothing else performed an important role in furnishing equity capital to their subsidiaries, we accord this contention special consideration below.

E. *Relations of Subholding Companies with Operating Companies*

1. Capital Supply

From the discussion set forth above, it is apparent that until November 1935 all contacts and dealings of the operating companies with the subholding companies took place exclusively through officers and employees of Bond and Share. To the operating companies, their subholding company parents were necessarily mere abstractions, with Bond and Share standing *in loco parentis*. Respondents have repeatedly urged, however, that it was the subholding companies which furnished the "risk capital" to the operating companies, and that the subholding companies also kept their subsidiaries supplied wit.. a steady stream of cash advances on open account.

104a/ Reference is had to Electric's investment in United Gas Corporation discussed *supra*.

The fact of the matter is, as we have already indicated, that no substantial amount of risk capital was furnished to the operating companies by either the subholding companies or by Bond and Share. The investment which the subholding companies made in the securities of the operating companies were made principally in the process of *purchasing control* of the operating companies from those in whom this control rested, a process which contributed nothing to the treasuries of the operating companies. In large measure, this process was effected merely through issuance by the subholding companies of their own securities to controlling interests in exchange for the securities of operating companies owned by such controlling interests. The record indicates that of American's total capitalization of $260,428,677 (exclusive of surplus), at least $185,937,000 of its securities constituting 71.4% of total capitalization were issued in exchange transactions of this type, and additional amounts were issued to procure cash for purchasing control in other situations. In the case of Electric, while not susceptible of exact computation, it appears that an equally great percentage of its total capitalization was issued directly in the process of acquiring control of operating properties or was issued indirectly in transactions essentially of the same character.

We have already described the financial pattern employed by the subholding companies (under Bond and Share's aegis) in setting up those operating companies which represented an amalgam of smaller units. *105/* Through system-

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105/ See notes 50 and 70 and text discussion at pp. 30-32 & 40-41, *supra*. As was pointed out in note 51, commencing in 1925 American acquired control of a number of companies which were already going concerns. Among these were: Superior Water, Light & Power Company, Central Arizona Light and Power Company, Northwestern Electric Company (all in 1925), The Washington Water Power Company, and The Montana Power Company (1928).

atically writing up the property accounts of the reorganized operating companies and causing them to issue to the subholding companies securities in amounts greatly exceeding the latter's cost, the subholding companies were enabled to recover all costs incurred in the process of combination as well as the greater portion, if not all, of their initial cost of acquiring control. *106/* The record presents this pattern stamped with almost monotonous regularity on each of the subsidiaries organized by American and Electric, as we previously found to be the case in National. We do not believe it is necessary to cumulate the details for each instance; a glance at Appendices E-2 and F-2 of this Find-

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106/ See note 50 *supra*, for mention of instances in which subholding companies emerged with a *minus* cost for their entire investment in subsidiaries. The record indicates that where the burden of the inflated structure could successfully be imposed on the rate payers, the return to the subholding company on its ordinarily insignificant investment, attained in the manner described above, was frequently striking. For example, in the case of Kansas Gas & Electric Company, American's first subsidiary in point of time, American for many years received an annual return in excess of 30% on the system investment, and over the entire 30-year period from 1910 to 1940, its return has averaged about 16% per year. In the case of Portland Gas & Coke Company, American's second subsidiary, its annual return for many years exceeded 43%, but commencing 1933, dividends were suspended not only on the common stock but on the preferred owned by the public. Arrearages have accumulated on the preferred each year since 1933, and at the present time exceed $53 per share. In the case of Nebraska Power & Light Company, American with a substantial *minus* investment received a total of $20,037,846 in dividends from acquisition in 1917 until the present time, and is currently receiving common stock dividends at the rate of $1,000,000 per year. Similarly, Electric, in the cases of Arkansas Power & Light, Mississippi Power & Light, and Louisiana Power & Light, from 1927 to 1932 received an annual return which averaged 26% on combined investment. Commencing 1933, however, dividend arrearages on the publicly-held preferred stock of Arkansas and Mississippi began to accumulate. In 1940, Arkansas Power & Light cleared off preferred arrearages, but in the case of Mississippi, such arrearages exist at the present time.

ings and Opinion demonstrates that each of the subsidiaries formed by either subholding company bears on its the deformities resulting from this type of birth, in the form of inflated plant accounts and overcapitalized structures. *107/*

It is true the record establishes that in the process of combining companies preparatory to formation of a reorganized operating company, the subholding companies did make outlays which in some instances were substantial. These, however, were purely transitional and not at all in the nature of equity capital. *108/* Moreover, it appears

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107/ The record also contains strong indication that most of the operating companies of the system have inadequate reserves for depreciation, resulting from the slender accruals made in past years in response to the insistent demands of their holding company parents for payment of the largest possible amount of dividends. This policy of reducing accruals to the depreciation reserve as low as possible in the interest of maintaining or increasing dividends to the holding company parent is observable in sharpest outline in instances where control was acquired of a well-developed operating company. For example, The Washington Water Power Company, prior to the time that American acquired control, had been consistently accruing to its book reserve for depreciation at a rate equal to approximately 3.37% of depreciable plant, and about the same amount was claimed for income tax purposes. In 1928, the first year of American's control, the accrual for depreciation was cut to 1.85% of depreciable plant, although no reduction was made in the amount claimed for income tax purposes, and dividends paid on common stock were increased. In subsequent years, book accruals were ultimately reduced to a low of 1.04%, or less than 1/3 the rate of accrual prior to American's control. It is also to be noted that the reduction in depreciation accruals was accompanied by a reduction in the ratio of expenditures for maintenance. (Cf. n. 132 *infra.*)

108/ For example, in the process of transferring the properties of a group of operating companies to a new large operating company, the subholding company frequently advanced the funds needed to call the outstanding bond issues of the constituent companies in order to permit a new bond issue covering all the property of the new company. The new bond issue would go to the subholding companies along with the preferred stock and common stock of the new company, and would promptly

that even in the making of these transitional outlays, the subholding companies were often merely conduits for the funds of Bond and Share and the other companies of the system, including the subsidiaries of the particular subholding company involved. *109/*

In the entire thirty-two year history of American, the record indicates only four instances of purchases of common stock of subsidiaries subsequent to organization, none of which constitutes an impressive instance of the supply of "risk capital". *110/* The record further indicates that in

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be resold by the subholding company (through Bond and Share and underwriters) to the public. Usually the gap between the calling of the bonds of the constituent companies and issuance of the new bonds did not exceed a period of weeks.

109/ All funds of each of the operating companies of the system not immediately needed in current operations were forwarded to Bond and Share and banked by it in New York banks. (This is still the practice.) Bond and Share would then draw on these funds to supply the immediate needs of other system companies through an elaborate system of debits and credits to the loan accounts maintained for each company. Moneys not needed by Bond and Share for system purposes were placed by it on loan in the call loan money market. In making loans to subholding companies such as American and Electric, it was Bond and Share's practice until 1930 to utilize so far as possible the available funds of the subsidiaries of the particular subholding company, through "upstream loans."

110/ In 1915, American accepted stock of Pacific Power & Light Company in the amount of $100,000 in exchange for some properties. In 1928, American purchased for $3,000,000, 300,000 shares of common stock of Kansas Gas & Electric Company, and in the same year made a similar purchase of common stock of Portland Gas & Coke Company. At the time of the purchase and for many years earlier, as has already been related, American had been receiving a return of 32% on its investment in Kansas and 43% on its investment in Portland. The purchases by American were in the nature of reinvestment of dividends previously received, and apparently resulted in each case in a sharp increase in the amount of dividends paid on the common stock in succeeding years. On the basis of the market price for utility stocks prevailing at the time, it ap-

instances in which American actually found it necessary to furnish capital to an operating company, it arranged to furnish such money in the form of a debt security, outranking the publicly-held preferred stocks. *111/*

In the case of Electric, we have already made reference to the fact that as respects the five operating companies of which Electric obtained control at its inception in 1925, Electric subsequently made additional investment in the case of only one, Dallas Power & Light Company. *112/*

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pears that both companies could have sold their common stock on the market at prices considerably in excess of the $10 per share paid by American.

The fourth of the instances referred to, was the purchase for $600,000 of additional common stock of Portland Gas & Coke in 1940. At that time American was seeking to arrange an extension of Portland's maturing bond issue. To facilitate such bond extension, and in connection with proceedings pending before this Commission, American agreed to make the additional purchase.

111/ For example, in the formation of Florida Power & Light Company in 1925, American transferred to that company assets which had cost American not exceeding $30,000,000 for securities of Florida aggregating $60,000,000, thus permitting American to retain Florida's entire common stock, having a stated value of $30,000,000, at no cost. Subsequently when it became evident that Florida's need for capital was greater than the public would supply under the circumstances, American loaned Florida $22,000,000 (of which a portion went to pay dividends to American) and later took from Florida 6% debentures in that amount. Although the publicly-held preferred stock of Florida later went into arrears of dividends, and remained in arrears for more than 7 years, American continued regularly to collect the 6% interest on the $22,000,000 of debentures. Other instances in which American made its investment in the form of debt securities are found in Pacific Power & Light Company, Texas Power & Light Company, Superior Water, Light & Power Company, and The Montana Power Company.

112/ This instance resembles that of American's 1928 purchases of additional common in Kansas Gas & Electric Company and Portland Gas & Coke in that Dallas was a highly prosperous and seasoned company which could easily have sold its common stock on the open market at a price considerably in excess

In respect of subsidiaries formed subsequent to its organization, other than the United Gas Corporation which has been described above, Electric made two purchases of no great significance. *113/*

Thus it appears that the contribution of the subholding companies in furnishing "risk money" to their subsidiaries is substantially on a level with the contribution of Bond and Share in furnishing risk capital to the subholding companies. We find that it has been the public investors in the

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of that paid by Electric, and the effect of Electric's purchase was to increase earnings still further. The prosperity of the Dallas Company apparently stems from the provisions of the company's franchise agreement with the city, entered into in 1917. At the time this agreement was entered into, the company's maximum allowed rate was 8 cents per kilowatt hour. The agreement provided that the company should be entitled to a 7% return on its rate base, but that for every reduction of ½ cent per Kwh below the 8 cents rate made by the company in the charge for energy, the company's allowed rate of return would increase ½ of 1% until the rate was reduced to 6 cents per Kwh; and thereafter for every reduction of ½ cents per Kwh, the company's allowed rate of return would increase ¼ of 1%. Thus, as the company reduced rates in line with the progress of the art, its allowed rate of return steadily mounted, so that at the present time the company is permitted to received a 9½% return on the rate base, although its rates stand at about the national average.

113/ In the case of Louisiana Power & Light Company, Electric purchased additional common stock in January 1931 for the aggregate sum of $1,000,000. This purchase was similar to those made by American in Kansas and Portland, and Electric in Dallas, as discussed above. At the date of the purchase, Electric had a negative investment of approximately $1,000,000 in Louisiana and had continuously been receiving large dividends. The other instance referred to was of a different character; Electric had been making purchase of various water sites near the White River in Arkansas, apparently with a view to selling them to its subsidiary, Arkansas Power & Light Company. In 1935 it had become apparent that the hoped for water power project would materialize in the remote future, if at all. Accordingly, Electric transferred the properties to Arkansas for approximately $2,300,000 of Arkansas' common stock, an amount equivalent to Electric's cost, plus approximately $500,000 of interest carrying charges.

securities of the subsidiaries of American and Electric who have supplied virtually all the capital that has gone into the development of such subsidiaries subsequent to their acquisition by American and Electric, just as it had been the public investors rather than Bond and Share who supplied to American and Electric the capital which enabled them to acquire such control. Nevertheless, full control over this money contributed by the public has been at all times exercised by Bond and Share whose contribution of capital to the system has been inconsequential. How Bond and Share has exercised this control, and for what purposes, has been sufficiently indicated in the foregoing pages.

Respondents have frequently reiterated the claim that the subholding companies have conferred substantial benefits on their subsidiaries by supplying them with large amounts of short-term capital in the form of loans. We encountered and discussed the same contention in our *National* Findings and are obliged to repeat here the substance of what we said previously: (1) the imposing totals which are mentioned by respondents are misleading since they reflect an indiscriminate cumulation of numerous transactions conducted on a daily basis in the form of open book accounts; *114/* (2) a considerable number and volume of the loans were arranged to make possible the payment by the subsidiary of dividends and interest to the subholding company in transactions which represented little more than book entries designated to enable the subholding companies to take into income account the sums which it "loaned" the subsidiary; (3) the monies loaned by the subholding

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114/ As we pointed out in the National Findings, it is not infrequent to find loans made and repaid several times in course of a single month. Thus, if $100 were loaned and repaid four times during one month, and this type of transaction occurred in three months during a year, respondents' total of loans would include $1200 for the year in question.

companies were to a large extent obtained from their respective subsidiaries in the form of upstream loans.

As we indicated in our earlier "Findings and Opinion" on National these loans do not impress us as having conferred any noteworthy benefit on the operating companies. Although they were practically riskless to the subholding companies, the operating companies were almost always charged not less than 6%, *115/* and apparently in many instances the interest was compounded quarterly. *116/* In large measure the loan transactions resulted from a system policy of restricting the cash and working capital of the subsidiaries to a minimum. Whenever the subsidiaries borrowed from banks, they were able to obtain funds at no less favorable terms than charged by the subholding companies, and generally on terms considerably more favorable. *117/* Moreover, these loans being in essence mere demand loans,

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115/ In some cases, rates as high as 8% were charged; in a few instances subsequent to 1937, however, American has made loans at times as low as 4%, and Electric as low as 3%.

116/ Debits and credits were being made almost daily, and each quarter the account would be debited for interest accrued during the period, thus effecting a compounding.

117/ The record is replete with instances in which the subholding company would cause the subsidiary to borrow from a bank in order temporarily to repay the subholding company (e.g. for year-end balance sheet clean-ups), such loans being obtained by the subsidiary from the bank at a rate considerably lower than that charged by the subholding company. Upon reinstatement of the loan with the subholding company, however, the higher rate would again be charged. The record also contains instances of operating companies which, prior to acquisition of control by one or another of the subholding companies, enjoyed bank credit at 4½ and 5%, but after becoming part of the Bond and Share system were caused to borrow from the subholding company at 6%.

Even at the present time the record indicates that American and Electric have loans outstanding with some of their subsidiaries on which they collect interest at the rate of 6%, although the going bank rate on loans to utilities for the past 5 years has been less than 3% and is now closer to 2%.

the subsidiaries could be, and at times were, placed in difficult and costly situations by the untimely demands of hard-pressed subholding companies. *118/*

Whatever may have been the situation in the past, we note that subsequent to November 1935, American and Electric have made loans to subsidiaries in perhaps a dozen instances, the amounts involved being relatively small and in most cases for very short periods. Since the subholding companies charged from 3 to 6% on loans which almost certainly could have been obtained by the subsidiaries from banks for less, *119/* it is clear that the transactions were de-

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118/ For example, the record discloses that in May 1921, American, being hard-pressed for funds, found it necessary to issue $3,500,000 principal amount of 20-year 8% notes, collateralized by bonds of four of its subsidiaries aggregating $7,000,000. American caused these subsidiaries to issue to it the aforementioned $7,000,000 of bonds carrying an interest rate of 8% in payment of existing open account indebtedness owing to American. Moreover, American credited the subsidiaries with only 86½ for each 8% bond issued.

A year and a half later, American was able to redeem its own notes and thereupon caused the subsidiaries to call their bonds, paying American $100. The cost to the subsidiaries for the 17-month period the bonds were outstanding was 28.2%, or an effective rate of 19.8% per annum.

The record indicates that the subsidiaries were not consulted in advance as to the transaction, their first notice being received from Bond and Share's New York office instructing them to execute necessary documents and make appropriate entries on their books.

119/ For example, on November 15, 1937, Central Arizona Light & Power Company borrowed $100,000 from American, the loan being outstanding for 1 month, at 4% interest. The record indicates that about the same period (December 18, 1937), Central Arizona borrowed $100,000 from a New York bank, paying it only 2% interest. On July 14, 1938, Central Arizona again borrowed $50,000 from American for 1 month and again paid interest at 4%.

Superior Water, Light & Power Company since 1932 has owed American open account indebtedness in the amount of $1,636,000, on which American regularly collected 6% interest until December 1, 1938. At the latter date, as the result of an

signed to benefit the subholding companies rather than the subsidiaries and were actually at the expense of the subsidiaries.

We note also that from November 21, 1935 to the present time, there have been no purchases by the subholding companies of any of the securities of their subsidiaries, with a single insignificant exception. *120/*

2. Other Aspects of the Relationship Between the Subholding Companies and Their Subsidiaries

In probing the insistent claims of the respondents as to the past benefits conferred by the subholding companies on their subsidiaries, other aspects of the relationship between the subholding companies and their subsidiaries came to light. We have already referred to the practice of writing up the property accounts of the operating companies of the system, and its consequences for both the investing and the consuming publics. Reference has also been made to some of the maneuvers employed to increase the voting strength of the subholding companies and of Bond and Share at the expense of the public security holders of the system, *121/*

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investigation by the Wisconsin Public Service Commission, interest was reduced to 5%, at which rate it is presently being paid although Superior last year found no difficulty in selling to banks $1,600,000 of notes at an interest rate of 1½ to 2½%. (See Holding Company Act Release No. 3265.) Similarly, American holds a note of Pacific Power & Light Company in the amount of $2,794,500, on which American has regularly collected, and now collects 6% interest. On November 25, 1940, this note matured and was continued as an "overdue note," concededly in order to avoid the necessity of obtaining the approval of this Commission with respect to the issuance of a new note.

120/ Reference is made to the purchase by American in 1940 of common stock of Portland Gas & Coke Company in the amount of $600,000, in connection with proceedings pending before this Commission for extension of Portland's bond issue.

121/ See note 62 *supra*.

to the servicing arrangements through which Bond and Share exercised control while realizing substantial profits, to the unsound depreciation and dividend policies imposed on the subsidiaries and to other intra-system transactions designed to benefit the holding companies at the expense of the operating companies. The fact is, as we pointed out in our earlier Opinion on National that the record abounds with reiterated and striking examples too numerous to detail here, of every type of holding company abuse enumerated in Section 1(b) of the Public Utility Holding Company Act of 1935. We find nothing in the record indicating that the relationship of the subholding companies to the operating companies has redounded to the benefit of the latter, or has been in any way in the public interest or the interest of investors or consumers. We find much which emphatically compels a contrary conclusion.

With respect to respondents' claims concerning improvements in service, lowering of rates and the like, we think it sufficient to quote from our discussion of these points in our *National* Opinion. We there stated:

> "There is no necessity to question that during the period of thirty odd years since acquisition of the first of the present National properties by Bond and Share there may have been improvement in efficiency and economy of operation, some lowering of electric rates, extension of the areas of service, and an increase in the use of electricity per customer in the aggregate. There is no evidence in the record, however, that such improvements were more noticeable in the Bond and Share system than elsewhere, and it is idle to speculate whether the course of technical development of the industry in general or of any particular properties might have been at a different pace if the phenomenon of holding company control had not arisen.

"In any event we are unable to find in these portions of the record any justification for the continued existence of National. In the first place, whatever contribution may have been made in the formative stage of the industry can hardly be significant at present, when the pioneering stage has definitely been passed and other and different problems are present. Whatever may have been the situation in the past, there is no indication that any of the operating companies will be in a position of requiring, or that National will be in a position to furnish, any benefits in the future. Secondly, to the extent that holding company benefits may have been conferred in the past it is clear from the above discussion of the functional nature of National that such benefits could not, by the very nature of National's organization, have been derived from it. . . .

"In conclusion, our examination of the record convinces us that claims of past benefits have not been established or are irrelevant; that whatever benefits may have existed were into-woven with and on the whole overshadowed by numerous abuses of the very kind which motivated the enactment of the statute; and that in any event there is nothing in the past history of the system that requires or justifies the continued existence of National under the standards of the statute."

V. Impact of Section 11(b)(2) on American and Electric

It is appropriate to project the Bond and Share system as it stands at the present time against the background of the historical survey set forth above, in order to determine whether and in what respects the system is repugnant to the standards of Section 11(b)(2), and if so found, to point the appropriate remedy. Since the standards of this section

are cast in terms of fair and equitable distribution of voting power and undue and unnecessary complexity, it is in these terms that we undertake our discussion.

A. *Distribution of Voting Power*

1. Over-all aspects

As has previously been stated *122/* the five subholding company subsidiaries of Bond and Share and their consolidated subsidiaries have combined consolidated capitalizations (including surplus) of $2,889,561,848. The securities of all system companies owned by Bond and Share have a stated value on the books of such companies of $576,013,000 after adjustment is made for accumulated dividend arrears on preferred stocks. *123/* This sum is equal to approximately 19.9% of the aforementioned combined consolidated capitalization of the five subholding companies. However, Bond and Share owns no equity securities in any of the 237 operating companies of the system with but one minor exception; *124/* such system operating company securities as Bond and Share does own (with the one exception noted) are debt securities, having no voting power. Thus, Bond and Share's basic control over its vast utility empire stems exclusively from its ownership of

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122/ *Supra*, Section III. A.

123/ In making adjustment for dividends in arrears, the amount of such arrearages has been added to the stated or liquidating value of the preferred stocks and deducted from the surplus and stated value of the common stock of the various companies. This adjustment has been made in connection with all computations indicated as having been adjusted for accumulated preferred arrears.

124/ The single exception relates to United Gas Corporation, a direct subsidiary of Electric. In addition to $52,925,000 of debt obligations of United Gas Corporation, Bond and Share owns 3.85% of the company's 7% preferred stock and 9.63% of its common stock.

minority interests in the equity securities of its five subholding company subsidiaries.

The equity securities (preferred and common) of the subholding companies owned by Bond and Share have a stated value on the books of such companies of approximately $456,000,000, after adjustment is made for accumulated dividend arrears on preferred stocks. These securities constitute the following percentages of the outstanding equity securities of each subholding company: *125/*

	Preferred Stocks	Second Preferred	Common	% of Voting Power of Securities Owned By Bond and Share to Total Voting Power
American & Foreign Power Co.	9.19%	83.11%	42.28%	42.28
American Gas and Electric Co.	—	—	18.90%	17.51
American Power & Light Co.	2.93%	—	31.17%	20.70
Electric Power & Light Corp.	.06%	18.49%	57.26%	46.83
National Power & Light Co.	—	—	46.56%	46.56

The preferred stocks of American & Foreign Power Company, Inc., and the second preferred stock of Electric shown in the foregoing table are, however, non-voting securities, and consequently do not contribute to the voting power held by Bond and Share. The fact is that the *voting securities* of its subholding companies owned by Bond and Share have a stated value on the books of these companies in the amount of only $53,337,600, after adjustment for preferred arrearages, equal to approximately 1.85% of combined consolidated capitalization of the five subholding company systems.

125/ In addition to the aggregate amount of equity securities set forth in the text, the subholding companies had outstanding (as of December 31, 1941) substantial amounts of debt securities. Of these, Bond and Share owns $37,900,000 of debt securities of American & Foreign Power Company, Inc. In addition, it owns debt securities of subsidiaries of the various subholding companies in the principal amount of approximately $82,000,000.

Although the securities of the subholding companies owned by Bond and Share in no case give Bond and Share a clear majority of the total voting power (and in the cases of American Power & Light Company and American Gas and Electric Company equal only 20.70% and 17.51% respectively), no question has been raised as to Bond and Share's effective control of each of the subholding companies with the sole exception of American Gas and Electrict Company. As to the latter, in a separate proceeding, *126/* we concluded we could not find, as requested by American Gas and Electric Company, that its management or policies are not subject to "a controlling influence" by Bond and Share within the meaning of Section 2(a) (8) of the Act. With respect to the four other subholding companies, the record of the present proceeding establishes that Bond and Share's control is complete and pervasive.

This control of the subholding companies by Bond and Share is not limited in operation to the mere casting of a certain percentage of votes at stockholders' meetings. It permeates every stratum and unit of the holding company system in the most comprehensive manner. *127/* For example, as will be recalled from our discussion in the previous section, the officers and entire personnel of each of the four subholding companies (other than American

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126/ *American Gas and Electric Company*, Holding Company Act Release No. 2749 (9 S.E.C. 247).

127/ This discussion relates primarily to the four subholding company subsidiaries other than American Gas and Electric Company. The latter was never a party to the present proceeding, since its status as a Bond and Share subsidiary was not determined at the time the proceeding was instituted. Moreover, as appears from the facts set forth in the Matter of American Gas and Electric Company (Holding Company Act Release No. 2749), the relations of Bond and Share to American Gas and Electric Company have always differed in important respects from Bond and Share's relations to the four other subholding companies.

Gas and Electric Company) are all trusted former employees of Bond and Share who had rendered Bond and Share long years of faithful service. The offices of the subholding companies are contiguous with those of Bond and Share in the Bond and Share office building at 2 Rector Street, New York City. All of the operating company subsidiaries of the subholding companies operate under service contracts with Bond and Share's wholly-owned service subsidiary, Ebasco Services Incorporated, whose extensive personnel and offices are also integrated with those of Bond and Share and the four subholding companies at 2 Rector Street. *128/*

Despite their unquestionable significance in the "control" picture of the Bond and Share system, however, it must be recognized that the factors described above are essentially the media by which Bond and Share *implements* its control; the control itself basically stems, as we have said, from its ownership of voting securities of the subholding companies. Through the concentrated voting power of the securities owned by Bond and Share, it is able to elect the directors of the subholding companies, and thus govern selection of the respective managements. *129/* Through the

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128/ The importance of Ebasco Services Incorporated as an agency for keeping the activities of the operating companies of the system under close scrutiny may be judged from the fact that while Bond and Share and each of the subholding companies has a staff of 20 to 25 employees, consisting mainly of the officers and clerical assistance, Ebasco Services Incorporated has a staff of 630 employees in its United States Division and 156 employees additional in its foreign division, consisting mainly of professional personnel such as accountants, analysts, and engineers.

129/ As indicated by the following table, at all stockholders' meetings held since 1935 by each of the four subholding companies, the percentage of votes cast by Bond and Share has been considerably greater than the proportionate voting power of the securities owned by Bond and Share.

managements of the subholding companies it is able to govern selection of the directors and managements of each of the operating company subsidiaries of each of the subholding companies. *130/* The latter are in turn responsive to Bond and Share's wishes respecting entry into service contracts with Ebasco Services Incorporated, and the details of the operations of their companies.

Thus, it is clear that through ownership of voting securities having a stated value on the books of the subholding companies (after adjustment for preferred arrears) of approximately $53,337,600 or 1.85% of total combined consolidated capitalizations of the five subholding company systems, Bond and Share is vested with so high a degree of voting power as to render completely ineffectual whatever voting power remains for the securities in the hands of

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	% of Voting Securities Owned by Bond and Share to Total Voting Power	% of Votes Cast By Bond and Share (average for period 1935-1941)	% of Votes Cast by Management Proxy Committee (including Bond and Share)
American Power & Light Co.	20.70	36.96	99.99
American & Foreign Power Co., Inc.	42.28	79.12	99.87
Electric Power & Light Corp.	46.83	74.90	99.93
National Power & Light Co.	46.56	66.04	99.97

The foregoing figures do not give effect to votes cast by companies and individuals presently or formerly affiliated with Bond and Share. It will be noted that although in the case of American, Bond and Share securities cast less than a majority of the votes, the management proxy (which represented Bond and Share) cast an average of 99.99% of the votes at all stockholders' meetings throughout the entire period.

130/ The subholding companies with but few minor exceptions own more than a clear majority of the voting securities of their subsidiaries. The presidents of the subholding companies testified that they deem it part of their duties to "advise" as to the selection of the directors and officers of their subsidiaries.

the public investors who have contributed more than $2,313,500,000 *131/* or 80.1% of such capitalizations.

Even these figures, moreover, do not measure the full inequity of the voting power distribution among the security holders of the Bond and Share system, since they are based on the assumed validity of the entries on the books of system companies, without adjustment for known write-ups and deficient depreciation reserves. The effect of such adjustments is indicated in the following paragraphs and in appendices E-1 and F-1.

Moreover, consideration of the comparative voting strength of the holding company and the public based on the book values represented by their respective securities is of course subject to further qualification in a case such as this, where, as our earlier discussion establishes, substantial portions of Bond and Share's holdings in the subholding companies were obtained gratis as a result of methods of financing employed at organization. Nevertheless, even without reference to this factor, the gross maldistribution of voting power is patent.

2. American and Electric Aspects

It is evident from the foregoing discussion that the unfair and inequitable distribution of system voting power which vests control of the system in Bond and Share through its ownership of subholding company voting securities representing at best 1.85% of the combined consolidated capitalizations of the subholding company systems (without adjustment for write-ups and deficient re-

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131/ This figure is after adjustment for cumulative dividend arrearages and after deduction of all securities of system companies owned by Bond and Share aggregating $576,013,000 principal amount or stated value as adjusted. As was previously stated, the aforementioned total of $576,013,000 is equivalent to approximately 19.9% of the total capitalization of the system, including debt securities and book surplus.

serves) results from, and exists by virtue of, utilization of the subholding companies as effective pyramiding devices within the Bond and Share system. The historical survey set forth in the preceding section hereof established that it was precisely for this purpose that American and Electric (as well as the other subholding companies) were created by Bond and Share. Consideration of the mathematical equations operative at the present time makes clear the manner in which American and Electric presently function as instrumentalities for effectuating and perpetuating the inequitable distribution of voting power in the Bond and Share system.

a. American

The total capitalization (including long term debt and surplus) of the subsidiaries of American is $729,143,155. If the integrity of these figures as they appear on the books of the respective subsidiaries be taken for granted, it follows that a total of $729,143,155 has been contributed to the companies of the American system by their security holders, including in such amount the sums left to accumulate in surplus accounts by the common stockholders. Based on the book values on issuer's books, the securities owned by American in its subsidiary companies had a book value of $303,837,930 or approximately 41.67% of the total capital (including surplus) contributed by all the security holders to the companies of the system.

We have previously pointed out, however, that the integrity of book figures of American's subsidiaries is refuted by evidence in the record pointing to vast amounts of system "write-ups" placed on the books of these subsidiaries by American and Bond and Share. If the apparent system write-up in each of these companies, as indicated in the present record, be deducted from the underlying book value

of the securities owned by American, it appears that the securities owned by American represent an interest of only 21.41% in the capitalization of American's subsidiaries. (See Appendix E-1.) Moreover, since the foregoing figures are based on the assumed validity of surplus accounts on the books of the subsidiaries, the record indicates that substantial further adjustment may be necessary because of the probable inadequacy of the reserves for retirements on the books of these companies. If such inadequacy be measured for present purposes by comparison with amounts allowed or claimed for Federal income tax purposes, *132/* the securities owned by American would represent only 4.75% of the capitalization of the subsidiaries as

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132/ The aggregate difference between book accruals and the amounts claimed or allowed to the subsidiaries of American for depreciation for Federal income tax purposes is $94,800,000 as shown in Appendix E-2. Concededly this is not to be deemed a conclusive figure. However, as we recently had occasion to point out (Matter of the United Corporation, Holding Company Act Release No. 3592) depreciation figures for income tax purposes frequently have been found helpful in determining the adequacy of depreciation for corporate purposes, and some authorities are of the view that in general "the income tax basis should be accepted rather than the book figures." We recently (June 15, 1942) made public a detailed report submitted to us by our Public Utilities Division entitled "Depreciation and Dividend Statistics of Electric and Gas Utility Subsidiaries of Registered Holding Companies, 1930-1940," in which, on the basis of the Division's study, it is stated that ". . . it is believed that the depreciation allowed for income tax purposes in the case of public utility companies constitutes a generally conservative and satisfactory criterion of the adequacy of the depreciation actually recorded on the books of such companies. . . ." It may be noted that in the same report a 10-year study of 168 subsidiaries of 30 public holding company systems discloses that book accruals for depreciation were smallest relative to depreciation for tax purposes in the case of the subsidiaries of American, out of the entire group of 30 holding company systems (Cf. n. 107 *supra.*)

adjusted on this basis. Nor does even this figure represent the smallest possible equity of American in the capitalization of its subsidiaries, because it makes no allowance for items in large amount, representing excess of system cost over original cost (classifiable as Electric Plant Acquisition Adjustments, Account 100.5) contained in the plant accounts of American's subsidiaries, as to which the uniform system of accounts of the Federal Power Commission provides that such items be "depreciated, amortized or otherwise disposed of" as the regulatory authority may require. *133/*

When the capital structure of American is considered as part of the structure of the holding company system of Bond and Share, by virtue of the introduction of the pyramiding factor and basic inequity of voting power which exists among the security holders of the American system is magnified manifold among the security holders of the American—Bond and Share system. For, as shown by Appendix E-1, Bond and Share is vested with effective control of the system through ownership of common and preferred stock of American equal to 3.68% of American's capitalization, (including surplus) which represent an interest of only 3.42% in the total capitalization of American's

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133/ The Federal Power Commission's System of Accounts for public utility operating companies is applicable to most of the subsidiaries of American and Electric, either by virtue of its having been adopted by the various state commissions as members of the National Association of Railroad and Utility Commissions, or by virtue of the application of our Rule U-27 prescribing such system for the subsidiaries of registered holding companies not subject to state commission's regulations. The Federal Power Commission has ordered that sums classifiable in Account 100.5 be removed from plant account, and charged against surplus or amortized. (Matter of *St. Croix Falls Minnesota Improvement Company*, F. P. C. Opinion No. 72.)

subsidiaries *before* adjustment for write-ups and depreciation. *134/*

On the basis of the foregoing figures, it is apparent we must find that voting power is unfairly and inequitably distributed among the security holders of the American system, and among the security holders of the American-Bond and Share system: *135/* and that accordingly the continued existence and capital structure of American unfairly and inequitably distribute voting power among security holders of the Bond and Share system.

b. Electric

The total capitalization (including long term debt and surplus) of the subsidiaries of Electric is $653,981,088. If the integrity of these figures as they appear on the books of the respective subsidiaries be taken for granted, it follows that a total of $653,981,088 has been contributed to the companies of the Electric system by their security holders, including in such amount the sums left to accumulate in surplus accounts by the common stockholders. Based on the book values on issuer's books, the securities owned by Electric in its subsidiary companies had a book value of $256,415,384 equal to approximately 39.21% of the total capital (including surplus) contributed by all the security holders to the companies of the system.

As in the case of American, the integrity of book figures of Electric's subsidiaries is refuted by evidence in the

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134/ The effect upon Bond and Share's interest when adjustments are made for write-ups and depreciation is shown in Appendix E-1.

135/ Cf: *International Hydro-Electric System et al* (Holding Company Act Release No. 3679), *The Middle West Corporation* (Holding Company Act Release No. 3580), *The Commonwealth & Southern Corporation* (Holding Company Act Release No. 3432), *Electric Bond and Share Company* (Holding Company Act Release No. 2962).

record pointing to vast amounts of system "write-ups" placed on the books of these subsidiaries by Electric and Bond and Share. If the apparent system write-up in each of these companies, *136/* as indicated by the present record, be deducted from the underlying book values, it appears that the securities owned by Electric represent an interest of approximately 32.72% in the capitalization of Electric's subsidiaries. (See Appendix F-1.) Moreover, the record indicates that substantial further adjustment may be necessary because of the probable inadequacy of the reserves for retirements and depletion on the books of these companies. If such inadequacy be measured for present purposes by comparison with amounts claimed or allowed for Federal income tax purposes, *137/* the securities owned by Electric would represent only 15.65% of the capitalization of the subsidiaries as adjusted on this basis. Nor does even this figure represent the smallest possible equity of Electric in the capitalization of its subsidiaries, because it makes no allowance for large amounts classifiable as Electric Plan Acquisition Adjustments, Account 100.5 contained in the plant accounts of Electric's subsidiaries with respect to which, as previously stated, the applicable Systems of Ac-

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136/ Exclusive of any system "write-ups" existing with respect to the United Gas Corporation as to which we make no comment for the reasons set forth earlier herein.

137/ The aggregate difference between book accruals and the amounts allowed to or claimed by the subsidiaries of Electric for depreciation and depletion for Federal income tax purposes is approximately $121,000,000 as shown in Appendix F-2. Concededly this is not to be deemed a conclusive figure. See footnote 132 *supra*. It may be noted also that of the $121,000,000 figure referred to in the text, approximately $80,000,000 is applicable to United Gas Corporation, as to which special tax provisions regarding gas production properties may make somewhat less appropriate the comparison between book figures and tax figures.

counts provide for amortization, depreciation, or other disposition as directed by the regulatory authority. *138/*

As in the case of American, when the capital structure of Electric is considered as part of the structure of the holding company system of Bond and Share, introduction of the pyramiding factor magnifies greatly the basic inequity of voting power distribution among the security holders of the Electric system. For, as shown by Appendix F-1, Bond and Share is vested with control of the Bond and Share—Electric system through ownership of common and preferred stock of Electric equal to 9.14% of Electric's capitalization, which represent an interest of only 8.72% in the total capitalization of Electric's subsidiaries *before* adjustment for write-ups and depreciation and depletion. *138A/*

On the basis of the foregoing figures, it is apparent we must find that voting power is unfairly and inequitably distributed among the security holders of the Electric system and among the security holders of the Electric-Bond and Share system; *139/* and accordingly that the continued existence and capital structure of Electric unfairly and inequitably distribute voting power among security holders of the Bond and Share system.

B. *Complexity*

Not only are the continued existence and corporate structure of American and Electric offensive to the voting power distribution standards of Section 11(b) (2), but we find that these companies also contribute in substantial measure to the undue and unnecessary complexity which exists in

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138/ See footnote 133, *supra*.

138a/ The effect upon Bond and Share's interest when adjustments are made for write-ups and depreciation is shown in Appendix F-1.

139/ See note 135, *supra*.

the Bond and Share system in contravention of that section. It is evident that both results follow from the basic circumstance that these companies constitute pyramiding devices, and that such results are in effect reverse sides of the same coin.

A glance at a corporate chart of the Bond and Share system *140/* conveys an impression of relative simplicity which is wholly delusive. In general outline there appears the top holding company on the first level, the subholding companies on the second level, and the subsidiaries of the latter on a third level, ranged in a pattern conveying a sense of the symmetrical and neat.

When this ostensibly simple pattern is brought into sharper focus, however, it is found to be interlaced with numerous complexities repugnant to the statute. Thus, it becomes apparent that each of the major corporate units at the base of the system itself has a complex capital structure in which the principals of pyramiding and leverage are employed in very full measure. Upon each such corporate structure there is superimposed a holding company with a complex structure of its own, and in turn, upon this holding company there is superimposed still another holding company having its own unduly complex structure, a high degree of pyramiding being employed in the process of superimposition. This situation exists as to more than 200 operating units in the Bond and Share system, *141/* and in some instances additional layers of holding companies are interposed beyond those found in the normal pattern. *142/*

140/ See Corporate chart set forth in Appendix A.

141/ As has been stated above, Bond and Share's subholding company subsidiaries have 237 direct and indirect subsidiaries.

142/ For example, The Montana Power Company, a subsidiary of American, in turn has two subsidiaries named Glacier Production Company and Great Falls Townsite Company. The Glacier Production in turn has a subsidiary called Inland

To render this situation concrete, we have set forth in graphic form as Appendices B-1, B-2 and B-3, a series of charts which show the source of income of Bond and Share, American and Electric for the year 1940, giving effect to the capital structures of the subholding and operating companies. From an examination of these charts, it is evident that although ostensibly the system is comprised of only *three* levels, nevertheless, income derived from the basic functions of the system, namely the generation and sale of electric energy and gas, cannot reach the common stockholders of the top holding company until it has been filtered through *seven to fourteen* classes of securities having prior claims to such earnings.

This multiplicity of steps obviously in itself creates a formidable problem for an investor in the securities of Bond and Share or the subholding companies seeking to appraise the earnings power of his securities. The problem is, of course, greatly intensified by the fact that the system income does not progress in a straightforward continuous line from step to step until the top level is reached, but is drawn off and co-mingled at the level of the subholding companies with income from all the subsidiaries of each of the subholding companies, and there diverted to meeting the requirements of the security structures of the subholding companies. In the case of three of the five subholding companies (American, Electric and American & Foreign Power Company, Inc.), the corporate structures are so ill-balanced that for the last 10 years dividends on preferred stocks have accumulated each year, and these ac-

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Empire Refineries, Inc., which in turn has two subsidiaries Moen-Leick Industries, Inc., and Chief Petroleum Company, Inc. None of these are utility subsidiaries as defined in the statute, but nonetheless, they serve to complicate the system structure. Similar examples to the foregoing are found throughout the system.

cumulated arrearages now constitute mountainous barriers athwart the flow of system income to the top level. *143/*

Furthermore, the problem of income appraisal is acutely complicated when viewed from its dynamic rather than its static aspects, in appraising the effects of changes and shifts of income. Where the investor is required, as is here the case, to evaluate the future earnings prospects of securities resting near the top of a pyramided structure, he is confronted with the almost impossible task of measuring the magnified impact of income changes at the lower levels of the structure upon those higher in the pyramid resulting from the sharp leverage factor of hyper-attenuated equities. *144/*

All the foregoing factors, of course, come into play as well in the appraisal of the asset value of the securities of Bond and Share and the subholding companies and serve to complicate the problems of appraisal beyond the limits of even the sophisticated investor. We ourselves in the past, in the performance of our statutory duties, have had occasion to attempt such an appraisal with respect to the preferred stock of Bond and Share and have been obliged to avow our inability to reach any meaningful result. *145/*

143/ Preferred dividend arrears of American and Electric are discussed *infra*.

144/ This leverage factor is also reflected in wide gyrations and instability of *market prices* of the securities of Bond and Share and the subholding companies, as is indicated by the tables showing market prices of these securities during the past decade (Appendices I, J, K).

145/ In an Opinion issued approximately one year ago we stated:

> "The extreme difficulty of assigning a specific value to the assets of Bond and Share at the present time is due to several causes. It is due in part to the situation of Bond and Share as the top holding company of an extremely pyramided holding company structure, with the result that developments affecting the values and earnings of the operating utility companies at the base of the pyramid are

In respect of the complexities of the Bond and Share system, it is evident that American and Electric, constituting as they do central tiers in the system pyramid, are necessarily major contributing factors. In our earlier Findings

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very sharply magnified in their effects on Bond and Share's own securities. Thus Bond and Share's investments consist chiefly of equity securities of five subholding companies, which in turn have an aggregate of over 240 subsidiaries. When it is realized that most of these companies, subholding companies and operating companies alike, have senior securities outstanding, that three of the subholding companies and many of the subsidiary companies have substantial preferred arrearages, that a large number of the subsidiaries operate in foreign countries as to which problems of currency values and exchange restrictions are present, and that Bond and Share is merely a minority (although controlling) stockholder in all of the subholding companies, some measure of the difficulty of appraising Bond and Share's assets appears.

"In large measure, moreover, the practices employed in the Bond and Share system prior to the enactment of the Public Utility Holding Company Act contribute to the difficulties of valuation. For example, our records indicate numerous instances of inflation of balance sheet items, questionable depreciation policies, and intercompany security and property transfers without the safeguards of arm's-length bargaining and apparently, in some instances at least, without due regard for the interests of other security holders. Many of these practices will necessitate various adjustments in the future which may affect the valuation of Bond and Share's assets, but the exact nature and scope of such adjustments can be determined only after further scrutiny of all pertinent facts.

"There are now pending before this Commission three separate proceedings involving major subsidiaries of the Electric Bond and Share system, which deal with problems of this kind. These proceedings relate respectively to United Gas Corporation, Florida Power & Light Company, and Pennsylvania Power & Light Company. Until their termination it is of course impossible to state what the precise outcome may be as affects the assets or revenues of Bond and Share. As previously stated, there are numerous similar problems with respect to other com-

and Opinion respecting National, we summarized the matter thus:

"In the matter of Columbia Gas & Electric Corporation (1941) Holding Company Act Release No. 2477, we pointed out that the continued existence of any unit which serves no useful purpose 'may well be considered, on any functional basis, to complicate unduly and unnecessarily *the structure*' of a holding-company system. There, however, we were speaking merely of certain inactive subsidiaries at the base of a holding-company system. It is evident that where, as in the case of National, the unit in question constitutes a major tier in a pyramided holding-company structure, the complicating effects of its continued existence are not only sharply magnified but are malignant rather than passive in character. Thus, by virtue of the continued existence of National (and to some extent, of its corporate structure) we find all the familiar complexities stemming from a pyramided holding-company system: wide gyrations in the market price and earning power of the securities of National and Bond and Share due to the sharp leverage factor deriving from their attenuated equity position; *146/* increased

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panies in the system as the result of practices engaged in prior to the enactment of the statute. Even though no proceedings are pending, many of these problems are just as difficult—and the resulting uncertainties of valuation just as significant—as in the cases where proceedings are under way for their solution." (*Electric Bond and Share Company*, Holding Company Act Release No. 2979. All footnotes in the original text have been omitted.)

In respect of certain of the situations referred to in the above quotation, it would appear that problems of an equitable nature involving the principles of the "Deep Rock" cases may be applicable, (*Taylor* v. *Standard Gas & Electric Company* 306 U. S. 307; *Pepper* v. *Litton* 308 U. S. 295).

difficulty for the investors in the securities of National and Bond and Share to appraise the financial position of earning power of their securities; increased expense and loss of efficiency to the security holders of National and Bond and Share; pressure upon the operating companies at the base of the system to adopt unsound dividend policies on compliance with the demands of the overcapitalized superstructures of National and Bond and Share.

"These are among the complications which presently result from the continued existence of National. There can be no question that these constitute 'undue' complications within the statutory meaning, since most of them are expressly enumerated in the statute as among the very abuses against which it is directed. *147/* . . ."

As is to be expected, the record establishes that all the aforementioned complications which we found resulted from the existence and capital structure of National result to at least as great an extent from the continued existence and capital structures of American and Electric.

Moreover, we find that the corporate structures and continued existence of American and Electric produce certain complexities not found in the case of National, or found only in much milder form. In general, these are the complexities stemming from the extremely top-heavy capital structures of American and Electric *148/* which the earn-

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146/ Of course, in the case of Bond and Share the leverage results not only from its holdings of National's securities but also from those of the other subholding companies of the system.

147/ Section 1 of the Act.

148/ A glance at the senior security ratios of American and Electric, even without adjustment for known system write-ups

ings of these companies have for many years been unable to support. As is shown on Appendices J and K of these findings, neither American nor Electric has succeeded in earning sufficient to meet the dividend requirements of their preferred stocks in any calender year in the entire ten-year period from 1932 to 1941, inclusive.

In the case of American, dividends on the preferred stocks were curtailed at the end of 1932 and have been paid at only a fraction of the normal rate in every year there-

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indicates how top-heavy the structures of these companies are:

	Per Books		Including Pfd. Arrearages	
	Amount	% of total	Amount	% of total
American				
Debentures	$ 45,849,000	16.9	$ 45,849,000	16.9
Preferred	177,145,326	65.5	212,260,114	78.5
Common and surplus	47,499,285	17.6	12,384,497	4.6
Electric				
Debentures	30,380,000	15.8	30,380,000	15.8
Preferred	84,575,466	44.0	135,464,791	70.4
Common and surplus	77,337,511	40.2	26,448,186	13.8

It will be recalled that at the inception of American the company's investment account was inflated $5,500,000, and that at the inception of Electric, inflation in investment account was approximately $46,600,000. If adjustment were made in the tables set forth above to eliminate these system write-ups in the investment accounts of the subholding companies, the results would be as follows:

	Per Books, Less write-up		After Elimination of Write-up and Including Pfd. Arrearages	
	Amount	% of total	Amount	% of total
American				
Debentures	$ 45,849,000	17.3	$ 45,849,000	17.3
Preferred	177,145,326	66.8	212,260,114	80.1
Common and surplus	41,999,285	15.9	6,884,497	2.6
Electric				
Debentures	30,380,000	20.9	30,380,000	20.9
Preferred	84,575,466	58.0	135,464,791	92.9
Common and surplus	30,737,511	21.1	(20,151,814)	(13.8)

( ) Indicates red figure.

after. Accordingly, arrearages on the preferred stocks have mounted year by year to the point where they now exceed, as has been pointed out, 3-1/2 years' requirements; and the passage of each year serves merely to render this situation more acute. *149/* In the case of Electric, dividends on the first and second preferred stocks were suspended in 1932 and were never resumed on the second preferred stock; fractional payments were made, however, on the first preferred stocks in 1940 and 1941 at the rate of 5% and 20%, respectively of the full rate. As has previously been pointed out, the accumulation of arrearages on Electric's first preferred stock now equals more than 9 years' requirements, and on the second preferred stock more than 10 years' requirements. *150/*

These mounting accumulations of arrearages have, of course, produced a continuously declining market price for the common stocks of both American and Electric; and significantly, as dividend arrearages in the preferred stocks of American and Electric have piled up, the market prices of these securities also have declined and now stand at their lowest levels since the enactment of the Public Utility Holding Company Act of 1935. *151/*

149/ Even when the earnings of American are consolidated with those of its subsidiaries, it is found that preferred dividend requirements were not earned in six out of the last ten years. In the case of Electric, first preferred dividends were not covered on a consolidated basis in six years during the 10-year period. We have previously had occasion to refer to the dangers of employing consolidated income figures in measuring the earnings available for securities of a parent company.

150/ See Appendix K.

151/ Where preferred stocks have dividend arrearages which are due to some temporary cause, such stocks frequently sell at a premium representing their augmented claims in liquidation and to future earnings. Where, as in the cases of American and Electric, increased arrearages are accompanied by in-

Nor are the complicating effects of these arrearages confined solely to the subholding companies, but it is apparent that they extend upward to Bond and Share, blocking the flow of income, *152/* complicating the task of asset valuation, and depressing the market prices of its securities. *153/*

It is evident from the foregoing earnings and market valuation figures that wholly apart from the standards of

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creasingly depressed market prices, it is evident that the markets view the underlying situation in a highly unfavorable light.

As is indicated in Appendix K, at the present time the first preferred stocks of Electric (having dividend arrearages of more than $55 and $65 per share and a liquidating value of $100 plus accumulated arrears) sell at about $19-1/2-$22 per share; the second preferred stock ($100 liquidating value and about $72 of dividend arrears) at about $4 per share, and the common stock at about $1-$1-1/2 per share. American's $5 and $6 preferred stock (having a liquidating value of $100 and accumulated dividend arrears of more than $18 and $22 per share) sell currently for about $14-1/2 and $16 per share respectively, and the common stock is traded at about 50 to 75 cents per share.

152/ Although the preferred stocks of Bond and Share are not in arrears of dividends, it is manifest that the company has been struggling for some time with the problem of supporting its capital structure with its dwindling income. In our Findings and Opinion issued last February in a proceeding relative to Bond and Share's request to be permitted to repurchase its preferred stock on the open market at prevailing depressed prices, we pointed out that "the record indicates some doubt that Bond and Share will cover its preferred dividend requirements for the year 1942 out of current earnings." (Electric Bond and Share Company, Holding Company Act Release No. 3339.)

153/ Bond and Share's $6 and $5 preferred stocks (having a liquidating value of $100 per share plus accumulated dividends) are selling at about $44 and $40 per share, respectively, although dividends have thus far been paid at the normal rate. As shown by Appendix I, Bond and Share's common stock has for some time sold in the neighborhood of $1 per share. In 1929 this stock sold for as high as $189 per share.

the Act, American and Electric are companies suffering from deep-seated maladies, the effects of which are communicated to the entire system of which they form a part. In terms of the statute, these maladies are expressed as additional and undue complexities within the meaning of Section 11(b) (2).

Moreover, as is established by the historical survey set forth in an earlier section of this Findings and Opinion, it is indisputable that American and Electric are not only *undue* complexities but are wholly *unnecessary* ones, inasmuch as there is not now, nor has there ever been, reason or purpose for their existence except as instrumentalities through which Bond and Share is able to control their systems by a pyramiding arrangement wholly repugnant to the statute. Neither for their subsidiaries nor for their own investors do these subholding companies perform, or have they ever performed, any useful function; indeed for the latter, they entail unnecessary expense *154/* and serious complications from an investment point of view in respects indicated above. It is to be noted, furthermore, that the increased taxes and operating costs which must be borne by the subholding companies and their subsidiaries by reason of the present war will necessarily aggravate the financial difficulties of American and Electric,

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154/ The operating expenses of American for the year 1941 aggregated approximately $764,480, which included a salary of $50,000 for the president of the company, $12,000 for the vice-president, and $53,712 additional for other salaries. In addition, the company paid $346,263 as federal taxes, franchise and other state taxes aggregating $20,000, all of which presumably would be saved for the stockholders of American if the company's income were received directly by them rather than through the company. The operating expenses of Electric for the year 1941 aggregated approximately $359,239 which included a salary of $49,375 for the president of the company, $9,396 for the vice-president and $54,205 additional for the salaries of other employees. In addition, the company paid $19,429 as state taxes and $110,003 as federal taxes.

and render their continued existence even more burdensome to their subsidiaries and security holders.

C. *Appropriate Remedy Under the Act*

It is established by the foregoing discussion that (1) the capital structures of American and Electric are unduly and unnecessarily complicated and that voting power is unfairly and inequitably distributed among the security holders of the American and Electric systems; (2) the corporate structures and continued existence of American and Electric unduly and unnecessarily complicate the holding company system of Bond and Share and unfairly and inequitably distribute voting power among the security holders of the Bond and Share system.

It is our duty under the statute to require that American and Electric shall take such steps as we find *necessary to ensure* 155/ that the corporate structure and continued existence of these companies shall no longer unduly and unnecessarily complicate the structure of the Bond and Share system and unfairly and inequitably distribute voting power among the security holders thereof. The action we must order to be taken is such as seems to us calculated to achieve this result most effectively and quickly, ever bearing in mind the stated policy of the Act to provide *as soon as practicable* for the elimination of all holding companies except as expressly provided in the Act. 156/

155/ Cf. *Jacksonville Gas Company et al,* Holding Company Act Release No. 3570; *The Commonwealth & Southern Corporation,* Holding Company Act Release No. 3432.

156/ Cf. *International Hydro-Electric System et al,* Holding Company Act Release No. 3679; *Standard Power and Light Corporation,* Holding Company Act Release No. 3607; *Electric Bond and Share Company et al,* Holding Company Act Release No. 2962; *North American Light and Power Company,* Holding Company Act Release No. 3233; *The United Light and Power Company,* Holding Company Act Release No. 2636 (8 S. E. C. 837).

In the light of all our findings above set forth, it is apparent to us that appropriate action to be required of American and Electric consonant with the statute is their prompt dissolution. While some measure of amelioration in their statutory offensiveness might be afforded by other approaches, in our opinion no approach presently available holds out the promise of effectuating the statute's requirements fully or promptly. The basis for this opinion is apparent from our discussion in the following section and need not be elaborated here.

It cannot be doubted that the dissolution of these companies which not only have never served any useful purpose but have been a medium of much harm, will effectuate the provisions and policies of the Act and will in all respects be beneficial to the public interest and the interest of investors and consumers; and we so find.

Before arriving at our definitive conclusion, however, we turn to accord consideration to the contention of respondents' counsel that the pendency of the 11(e) Plans of American and Electric constitutes a barrier to the entry by us of an order requiring the dissolution of those companies. This subject is treated in the following section.

VI. Contentions of respondents respecting the 11(e) plans

A. *Nature of the Argument*

Mention has previously been made of the fact that on July 23, 1941, American, and on December 4, 1941, Elec-

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Section 1 (c) of the Act states that:

". . . it is hereby declared to be the policy of this title in accordance with which policy all the provisions of this title shall be interpreted, to meet the problems and eliminate the evils as enumerated in this section . . . and for the purpose of effectuating such policy to compel the simplification of public-utility holding company systems and the elimination therefrom of properties detrimental to the proper functioning of such systems, and *to provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided in this title.*" (Italics supplied.)

tric, filed with us documents termed "applications under Section 11(e)" for approval of "Plans to Enable (the) Company to comply with subsection (b) of Section 11 of (the) Act". At the time these documents were filed, hearings had been in progress in the 11(b) (2) proceedings for more than a year, and the record as to both American and Electric was approaching completion. *157/* As we have noted in December 1941, motions were made by counsel for American and Electric to consolidate the 11 (e) plans with the present proceeding, but by agreement of counsel for the companies and the Public Utilities Division such motions were held in abeyance until completion of the record in the 11(b) (2) proceeding, and have been presented for our determination together with the record of the proceeding. *158/*

As we have already indicated, counsel for American and Electric have contended that the pendency of these "plans" constitutes a barrier to our issuance of an order requiring the dissolution of these subholding company respondents, and it is evident that this was one of the reasons for filing the plans. *159/*

157/ Despite the time which has elapsed since the filing of the American plan, a total of only 19 days of hearings has taken place with respect to American subsequent to the filing and a total of 19 days of hearings has taken place since the filing of the Electric plan.

158/ See our ruling on such motions at Section II of this Findings and Opinion, *supra*.

159/ It is to be noted that the minutes of the board of directors of American reveal that at a meeting held April 23, 1941, the president of American reported to the board concerning the progress of his cross-examination in the present proceeding by counsel for the Public Utilities Division, and estimated that such cross-examination would be completed in about 60 days' time. The minutes reveal that the president's estimate of the time wl ch remained was confirmed by the company's counsel who was present at the meeting, and who advised the directors that "a peremptory order of dissolution was a

This contention of respondents is apparently based on the following line of reasoning: In view of the fact that the 11(e) plans of American and Electric purport to set forth programs whereby both companies may be brought into conformance with the Act, the Commission must permit a record to be made with respect to these plans before it will be in a position to pass upon the pending issue in the 11(b)(2) proceeding. This, it is urged, follows from the fact that the stated issue in the present proceeding is *whether it is necessary* to require the dissolution of American and Electric in order to effectuate the provisions of Section 11(b)(2), and the Commission cannot resolve this issue in the affirmative at the present time by finding dissolution *necessary*, if it may be shown that the 11(e) plans of American and Electric in fact provide an alternative for the attainment of the statutory objectives. Accordingly, in order to ascertain whether the 11(e) plans may be approved by us as "necessary to effectuate the provisions of subsection (b) [of Section 11] and fair and equitable to the persons affected by such plan," *160/* evidence relative to these issues must be adduced and a record made. *161/*

We are of the opinion that this reasoning rests on fallacious premises, stemming primarily from respondents'

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contingency which should be faced and which the company should be prepared to meet, if it should occur". Counsel then advised that the directors give consideration to the formation of a plan or plans for the company in the light of those facts.

160/ Section 11(e) of the Act provides in part that:

> "If, after notice and opportunity for hearing, the Commission shall find such plan . . . necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan. . . ."

161/ As was noted earlier (Section II, *supra*) evidence concerning valuation was offered by respondents and properly excluded by the examiner.

misconstruction of the word "necessary" as used in Section 11 of the Act and in our definition of the issue in the present proceeding. *162/*

We regard as wholly untenable respondents' contention that in carrying out our duties under Section 11 we cannot find "necessary" a course of action for which some alternative may be present, since such a construction would lead to the result that we should be rendered impotent to order *any* action where several courses of action appeared available to achieve the statutory objectives. On the basis both of plain logic and the basic principles of statutory construction, we deem it indisputable that the steps or action we must find "necessary" within the meaning of Section 11 are such as seem to us designed to *ensure* effectuation of the provisions of the Section *most effectively and promptly. 163/*

B. *Considerations Bearing on the Plans*

An examination of the 11(e) plans of American and Electric has convinced us that they will certainly not effectuate the statutory requirements promptly. Furthermore it is evident that in their present form and under existing circumstances the plans hold out no real promise of effectuating such requirements at all.

162/ It will be recalled that by our Order of June 7, 1940 (See Holding Company Act Release No. 2099, 7 S. E. C. 391), we limited the various issues set forth in our Notice and Order for Hearing to the initial issue of whether the dissolution of the subholding companies is necessary to effectuate the provisions of Section 11(b).

163/ Compare our opinion in *The Commonwealth and Southern Corporation,* Holding Company Act Release No. 3432, where we found it was necessary to order that the respondent corporation be reduced to a single class of stock because this was "the most *efficient and effective* way of ensuring attainment of the statutory objectives", and referred to the "*unwarranted delay* in carrying out the legislative mandate" which would result from following a course of procedure urged by the respondents.

With respect to the former point, that of promptness, it need only be considered that it would be necessary for respondents and the Public Utilities Division to formulate and present, and for us to explore, detailed and very extensive evidence on a number of extremely complex subjects before it would be possible for us to determine even the preliminary question of whether the 11(e) plans do in fact constitute acceptable alternative courses of action for achieving the objectives of Section 11. In the event it were necessary to determine the question in the negative, presumably we should be free (even under respondents' contention) to enter our order of dissolution herein following the lengthy delay, unless respondents in the meantime proposed a new 11(e) plan which would necessitate a repetition of this process. On the other hand, in the event we were ultimately able to approve the plans, they would still not become effective unless and until ratified by vote of the companies' stockholders. *164/*

Considering that seven years have now gone by since the effective date of the Act, that four and one half years have elapsed since the date after which action under Section 11 was to be required "as soon as practicable", and that more than two years have been consumed since the present

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164/ American's plan states "If approved by (the) Commission, the Plan will be offered to stockholders merely as a recommendation for their consideration or rejection in discharge of what the Directors conceive to be their duty, to propose what seems to them the best solution of a difficult problem." The plan specifically states that it is not to become effective unless 90% of each class of preferred stock and a majority of the common stock shall affirmatively vote to accept it.

Electric's plan does not provide what vote of the various classes of securities will be necessary but merely stated "Upon consideration and final approval by the Commission of the Plan, including any amendments proposed and adopted, the Board of Directors will call a stockholders' meeting with the stated objective of submission of the Plan for approval and appropriate action."

proceeding was instituted, it is evident that respondents' program is too fraught with potentialities of delay to be acceptable as a substitute for a dissolution order to meet the problems existing under Section 11(b) (2). *165/* Section 11(e) which provides a medium for voluntary compliance with Section 11(b) was not intended to oust the Commission of its jurisdiction, or relieve it of its obligation, to enforce the provisions of 11(b).

Turning now to the question of whether, regardless of the time factor, the 11(e) plans of American and Electric in their present form hold out real promise of effectuating Section 11 at all, we shall summarize our views under two heads: (1) incompleteness; and (2) ineffectiveness.

(1) Incompleteness.

We do not deem it necessary to undertake here a detailed discussion of the provisions of the 11(e) plans of American and Electric. In essence they provide that each company will: (a) reorganize its capital structure by issuing a single class of stock to be distributed among its present stockholders "on such basis as shall seem fair, taking into consideration existing rights, values, and other relevant fact-

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165/ In *The Commonwealth & Southern Corporation*, Holding Company Act Release No. 3432, we were similarly confronted by an 11(e) plan that would have necessitated exploration of complex 11 (b) (1) and other problems, and it was similarly argued that the filing of such plan precluded us from entering our order in the 11 (b) (2) proceeding. We found this argument untenable, stating "indeed it would be clearly improper for us to decide that the filing of a voluntary plan precludes us from taking appropriate action in line with our mandatory duties under Section 11 (b)."

Prominent among the unacceptable features of the plan there involved was the time factor which impelled us to say "we do not feel at liberty to countenance the immeasurable and unnecessary delay that would result from our acceptance of Commonwealth's suggestion".

ors;" *166/* and (b) limit the operations of its holding company systems to such subsidiaries comprising "single integrated public utility systems" and incidental businesses as the company may be permitted to retain under the statute, and dispose of its holdings in the securities of all other subsidiaries. Thus, the plans purport to tender compliance with both Sections 11(b) (1) and 11(b) (2) of the Act.

On their very face these documents are lacking in a number of elements which would seem essential to constitute a true "plan" as the term is employed in Section 11(e). For example, neither plan makes provision for the number of shares of the new capital stock to be issued, the aggregate par value thereof, and most important, the manner and proportions in which such stock shall be allocated among the various classes of existing security holders of the companies. Neither plan, moreover, makes definite provision for the retirement of the outstanding debentures of the companies, both documents making such vague statements in that regard as to leave them lacking in any provision for debt retirement. *167/* With respect to the 11(b) (1) issues, although the "plan" of American asserts that the subsidiaries of American comprise six systems within the meaning of 11(b) (1), not more than one of which may be

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166/ The quoted language is from Electric's plan. The analogous language in American's plan as to the manner of allocation is: "these problems are left open for determination upon consideration of all equities and pertinent facts".

167/ With respect to the necessity of eliminating long-term debt from the structures of holding companies where the portfolio consists largely of common stocks and the underlying structures are themselves complex, in order to conform to the provisions of Section 11 (b) (2), see our Findings and Opinion in *The Commonwealth & Southern Corporation*, Holding Company Act Release No. 3432; *Cf. International Hydro-Electric System*, Holding Company Act Release No. 3679.

retained under our reiterated interpretation of clause (B) of 11(b) (1), *168/* the document omits to state which system American elects to retain. Furthermore, neither plan gives any specific indication whatever as to the manner and circumstances of disposing of the large amounts of portfolio securities as to which disposition would be necessary; nor does either plan advance a program for recapitalizing the subsidiaries to be retained, in order to eliminate write-ups and otherwise conform them to the standards of the Act. *169/*

The foregoing omissions are so serious in nature and so far reaching in scope that we have no doubt these documents in their present form could properly be dismissed by us upon appropriate notice to the respondents.

(2) Ineffectiveness.

Even if there were not missing from these documents the vital elements adverted to above, there would be serious question as to their effectiveness to achieve the result presumably intended by the respondents—namely, to provide an alternative method of removing American and Electric from the statutory condemnation which, we have found, necessitates their dissolution. Viewing these documents in their most favorable aspect as valid 11(e) plans, it is evident that they purport to provide merely for

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168/ American's plan states that "American Company claims the right to elect any two of the groups as the integrated systems which it is permitted to retain under the Public Utility Holding Company Act", but it was testified that this provision was inserted prior to the issuance of our Opinion in *Engineers Public Service Company* et al, Holding Company Act Release No. 2897 (9 S.E.C. 764) which would require limitation to the only one of the alleged systems.

169/ In the case of the American plan, the vagueness of the company's intentions is increased by numerous "reservations of right to modify" various provisions of the plan, including even "the right to propose complete liquidation" of the company.

some measure of simplification in the corporate structures of American and Electric, coupled with some reference to geographic integration requirements of Section 11(b) (1). While it is true that the complexities in the corporate structures of American and Electric are repugnant to the statutory standards, we have found that the existence of these companies as pyramiding devices in the Bond and Share system is one of their most important statutory offenses. To the problem of eliminating American and Electric as pyramiding devices in the Bond and Share system, the plans do not make even the slightest allusion. It may be conceded that as simplification is effected in the corporate structures of the subholding companies, some amelioration will be achieved in *the degree* of pyramiding which they produce in the system, but pyramiding may still exist through the medium of a subholding company which has only a single class of stock outstanding. Thus, if in the proposed recapitalization of American and Electric, Bond and Share should emerge with blocks of voting securities which in themselves or in conjunction with other factors would enable it to exercise control or a "controlling influence" in these companies within the meaning of Section 2(a) (8) of the Act, the reorganized companies will continue to be pyramiding instrumentalities and complexities within the Bond and Share system in violation of Section 11(b) (2). *170/*

In other important respects the plans as filed by American and Electric, even viewing them in the most favorable

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170/ It is noteworthy that counsel for respondents sought to introduce testimony in the 11 (b) (2) proceeding calculated to establish that American's assets have a present value *considerably higher* than their carrying value on the company's books.

The president of American specifically admitted on cross-examination that nothing in American's plan provided for severance of Bond and Share's control over American and stated significantly, "No plan presented by American can

light, would in all probability prove ineffective to remove statutory repugnancies. For example, we have pointed out that American and Electric are undue and unnecessary complexities partly because they do not perform, nor have they ever performed, any useful function. Nothing contained in the plans filed by the Respondents in our judgment is calculated to impart a useful function to these companies. In this connection, it is argued that these companies might perform the function of "holding together" integrated public utility systems as contemplated by Section 11(b) (1). However, this argument fails to impress us for a number of reasons. There is nothing about the subholding companies which makes them vehicles for holding together a single integrated system in any respect superior to any other corporate entity, and in fact it would seem that a company specially formed for this purpose, with appropriate domicile and a charter and by laws free from the complexities found in those of American and Electric, would be far preferable. *171/* More important it is not at

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ever provide for the severance of control by Electric Bond and Share, as I understood the matter."

Although stating that after distribution of the new securities, there would probably be a new election of directors, American's president conceded that the plan made no provision for the removal of the proxy machinery from the hands of the present management and for other safeguards to ensure that the present management and directors of American who had been placed in office by Bond and Share would not be permitted to perpetuate their tenure of office. (Cf. The safeguards set up in *Jacksonville Gas Company*, Holding Company Act Release No. 3570).

171/ In this connection, respondents urge that the formation of a new corporation might prove a burdensome expense because of transfer taxes and other taxes. However, we note that in Bond and Share's past career it formed and dissolved dozens of holding companies apparently without finding the tax problems a deterrent, and we further note that American's 11 (e) plan itself contemplates the formation of three new holding companies to facilitate the reorganization.

all certain on the present record that either American or Electric possesses any "single integrated system" which requires a holding company to hold it together. Without making any judgment on these points at this time, it may be stated that our uncertainty arises from two causes: first, it is an open question whether American and Electric will be able to sustain their claims as to their alleged "integrated systems", or as to their right to retain alleged additional systems under the standards of Section 11(b)(1): *172/* secondly, in the light of data in the record concerning write-ups in the property accounts, depreciation policies, and earnings histories of the system companies, there likewise exist substantial questions as to the equity of American and Electric in many of the subsidiaries which they claim as important parts of their systems; if it should later be determined that little or no equity exists in certain such companies, they of course would not be retainable apart from the standards of Section 11(b)(1). *173/*

Furthermore, in considering the probability of the plans'

172/ For example, the areas covered by American's alleged "Northwestern System" and Electric's alleged "Southern Electric System" raise immediate question as to whether such areas conform to the statutory requirement of being ". . . . not so large as to impair (considering the state of the art and area or region affected) the advantages of localized management, efficient operation, and the effectiveness of regulation."

173/ For example, in the case of American's alleged Northwestern system, the record indicates doubt that after adjustment for write-ups and inadequate depreciation reserves, there remains any substantial equity asset-wise for American in four of the five companies alleged to comprise this system, namely, Pacific Power & Light Company, Northwestern Electric Company, Portland Gas & Coke Company and Montana Power Company.

Similar doubt exists as to the principal companies in American's alleged Texas system and as to the companies claimed to constitute Electric's "Southern Electric system."

effectiveness to satisfy the statutory requirements, it must be borne in mind that the plans as filed might never become effective at all, even if approved by us at the end of long proceedings, because they are expressly made subject to stockholder ratification which will be sought only after our approval is obtained.

From the foregoing discussion it is clear that in a number of important respects the present plans of American and Electric completely fail to satisfy the statutory requirements effectively, even if the important element of time be wholly disregarded. Under the circumstances we have difficulty in perceiving how it can be seriously urged that by virtue of these documents the dissolution of American and Electric is not "necessary" within the statutory meaning. Accordingly we reaffirm our finding that such dissolution is necessary.

C. *Considerations with respect to form of order*:

Apart from the contention that the 11(e) plans constitute a barrier against a dissolution order, which we have rejected for reasons stated above, it has been urged that the Commission's order should not exclude the possibility of American and Electric actually proceedings to reconstitute themselves and their systems in such manner that dissolution will no longer be necessary. Specifically it has been urged that our order should contain a reservation to the effect that American and Electric, or either of them, shall have the right to apply to this Commission for the revocation or appropriate modification of such order if within the time allowed by the statute (unless extended as provided in the statute) they, or either of them, shall have

(a) ceased to be a part of the holding company system of Bond and Share or affiliated therewith,

(b) reduced their respective capital structure to a

single class of stock conforming in all respects to the standards of Section 11(b) (2), and

(c) disposed of all securities and properties except those which represent such system or systems and incidental businesses as are retainable under the standards of Section 11(b) (1) and in consonance with the standards of Section 11(b) (2).

We are unable to agree as to the necessity or desirability of such a provision in our order, since, as we have recently had occasion to point out, *174/* the statute itself makes provision for revocation or modification of any order under Section 11(b) if the Commission finds, after notice and opportunity for hearing, "that the conditions upon which the order was predicated do not exist."

VII. Conclusions and Reservation of Jurisdiction

In line with what we have said in the foregoing sections, our conclusions are: (1) that the corporate structures and continued existence of American and Electric unduly and unnecessarily complicate the structure of the Bond and Share system and unfairly and inequitably distribute voting power among the security holders of such system; (2) that to effectuate the statutory requirements it is necessary that American and Electric be dissolved.

It is our intention to supervise all details of the effectuation of the order to be issued hereunder to ensure that the public interest and the interests of the security holders of American and Electric are safeguarded in all respects. Moreover, as we have noted, the practices of American and Electric have created many problems for their subsidiaries for which remedies must be found in order that these companies may be restored to a condition of soundness in the

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174/ The *North American Co.*, et al, Holding Company Act Release No. 3630.

interest of their security holders and the consuming public. Accordingly, we shall reserve jurisdiction to enter such orders as may be necessary for the purpose of assuring that the liquidation of American and Electric is carried out consistently with all the standards of the statute.

We reaffirm ou reservation of jurisdiction, previously noted, with respect to all issues specified in our Notice and Order for Hearing dated May 9, 1940, except the issue specified in our Order of June 7, 1940 which we have determined herein.

By the Commission (Chairman Purcell and Commissioners Healy, Burke and O'Brien), Commissioner Pike not participating.

For ORVAL L. DuBOIS, *Secretary.*

[SEAL]

By NELLYE A. THORSEN, *Assistant to the Secretary.*

UNITED STATES OF AMERICA

Before the Securities and Exchange Commission

At a regular session of the Securities and Exchange Commission, held at its office in the City of Philadelphia, Pennsylvania, on the 22nd day of August, A. D., 1942.

In the Matter of

Electric Bond and Share Company,
American Power & Light Company,
Pacific Power & Light Company,
Electric Power & Light Corporation,
Utah Power & Light Company,
National Power & Light Company,
Ebasco Services Incorporated,

Respondents.

File No. 59-12

Public Utility Holding Company Act of 1935—Section 11(b) (2).

ORDER REQUIRING DISSOLUTION OF AMERICAN POWER & LIGHT COMPANY.

The Commission having on May 9, 1940 issued its notice of and order for hearing instituting this proceeding pursuant to Section 11(b) (2) of the Public Utility Holding Company Act of 1935 and having issued supplementary Orders dated June 7, 1940 and June 17, 1940; and

After hearings had been held in the above matter, the Commission having issued its order dated August 23, 1941 requiring the dissolution of respondent National Power & Light Company and reserving jurisdiction as to the issues in the proceeding with respect to the other respondents; and

Further hearings have been held in the above matter, and counsel for the respondents and for the Public Utilities Division having stipulated that the record may be closed with respect to respondent American Power & Light Company, and that the Commission may proceed to enter its findings, opinion, and order with respect to the aforesaid Respondent; and

Counsel for the respondent having waived any right to a trial examiner's report or to submit proposed findings of fact, oral argument or briefs with respect to the issues herein as respects the aforesaid respondent; and

The Commission having examined the record herein and having considered all motions and objections urged by the respondents and having this day made and filed its findings and opinion thereon, finding *inter alia* that the action hereinafter directed to be taken is necessary to ensure that the corporate structure and continued existence of respondent American Power & Light Company shall not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among se-

curity holders, of the holding-company system of Electric Bond and Share Company:

It is ordered that the motion filed by counsel for respondents to dismiss the Commission's notice of and order for hearing dated May 9, 1940 and supplementary order dated June 7, 1940, and to dismiss the within proceeding, be, and the same hereby is, denied as to respondent American Power & Light Company; and that the motion filed by respondents to strike various exhibits introduced in evidence by counsel for the Public Utilities Division, be, and the same hereby is denied as to respondent American Power & Light Company; and that the exceptions noted by respondents to rulings of the trial examiner during the course of the hearings be, and the same hereby are, overruled as to respondent American Power & Light Company; and

It is further ordered that the motion of respondents to consolidate with the within proceeding a certain "Application for approval of Plan Under Section 11(e) of the Public Utility Holding Company Act of 1935" heretofore filed with this Commission by American Power & Light Company be, and the same hereby is denied; and

It is further ordered pursuant to Section 11(b) (2) of the Public Utility Holding Company Act of 1935 that the existence of American Power & Light Company shall be terminated and that said company shall be dissolved;

It is further ordered that respondent American Power & Light Company and respondent Electric Bond and Share Company shall proceed with due diligence to submit to this Commission a plan or plans for the effectuation of this order, and shall take such other and further steps as may be necessary or appropriate to effectuate this order; and

It is further ordered that jurisdiction be, and the same hereby is, reserved to enter such further orders as may be

necessary or appropriate for the purpose of ensuring tha the provisions of this order are carried out in a manne consistent with the public interest and the provisions of th Act; and that jurisdiction be, and the same hereby is, re served with respect to all issues in the within proceedin not resolved by the provisions of this order above set forth

By the Commission.

For ORVAL L. DuBOIS, *Secretary.*

[SEAL]

By NELLYE A. THORSEN, *Assistant to the Secretary.*

UNITED STATES OF AMERICA

Before the Securities and Exchange Commission

At a regular session of the Securities and Exchange Commission, held at its office in the City of Philadelphia, Pennsylvania, on the 22nd day of August, A. D., 1942.

In the Matter of

Electric Bond and Share Company,
American Power & Light Company,
Pacific Power & Light Company,
Electric Power & Light Corporation,
Utah Power & Light Company,
National Power & Light Company,
Ebasco Services Incorporated,

Respondents.

File No. 59-12

Public Utility Holding Company Act of 1935—Section 11(b) (2)

ORDER REQUIRING DISSOLUTION OF ELECTRIC POWER & LIGHT CORPORATION.

The Commission having on May 9, 1940 issued its notice of and order for hearing instituting this proceeding pur-

suant to Section 11(b) (2) of the Public Utility Holding Company Act of 1935 and having issued supplementary orders dated June 7, 1940 and June 17, 1940; and

After hearings had been held in the above matter, the Commission having issued its order dated August 23, 1941 requiring the dissolution of respondent National Power & Light Company and reserving jurisdiction as to the issues in the proceeding with respect to the other respondents; and

Further hearings have been held in the above matter, and counsel for the respondents and for the Public Utilities Division having stipulated that the record may be closed with respect to respondent Electric Power & Light Corporation, and that the Commission may proceed to enter its findings, opinion, and order with respect to the aforesaid respondent; and

Counsel for the respondent having waived any right to a trial examiner's report or to submit proposed findings of fact, oral argument or briefs with respect to the issues herein as respects the aforesaid respondent; and

The Commission having examined the record herein and having considered all motions and objections urged by the respondents and having this day made and filed its findings and opinion thereon, finding *inter alia* that the action hereinafter directed to be taken is necessary to ensure that the corporate structure and continued existence of respondent Electric Power & Light Corporation shall not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of the holding-company system of Electric Bond and Share Company:

It is ordered that the motion filed by counsel for respondents to dismiss the Commission's notice of and order for hearing dated May 9, 1940, and supplementary order dated

June 7, 1940, and to dismiss the within proceeding, be, and the same hereby is, denied as to respondent Electric Power & Light Corporation; and that the motion filed by respondents to strike various exhibits introduced in evidence by counsel for the Public Utilities Division, be, and the same hereby is denied as to respondent Electric Power & Light Corporation; and that the exceptions noted by respondents to rulings of the trial examiner during the course of the hearings be, and the same hereby are, overruled as to respondent Electric Power & Light Corporation; and

It is further ordered that the motion of respondents to consolidate with the within proceeding a certain "Application for approval of Plan Under Section 11(e) of the Public Utility Holding Company Act of 1935" heretofore filed with this Commission by Electric Power & Light Corporation be, and the same hereby is denied; and

It is further ordered pursuant to Section 11(b) (2) of the Public Utility Holding Company Act of 1935 that the existence of Electric Power & Light Corporation shall be terminated and that said company shall be dissolved;

It is further ordered that respondent Electric Power & Light Corporation and respondent Electric Bond and Share Company shall proceed with due diligence to submit to this Commission a plan or plans for the effectuation of this order, and shall take such other and further steps as may be necessary or appropriate to effectuate this order; and

It is further ordered that jurisdiction be, and the same hereby is, reserved to enter such further orders as may be necessary or appropriate for the purpose of ensuring that the provisions of this order are carried out in a manner consistent with the public interest and the provisions of the Act; and that jurisdiction be, and the same hereby is, reserved with respect to all issues in the within proceed-

ing not resolved by the provisions of this order above set forth.

By the Commission.

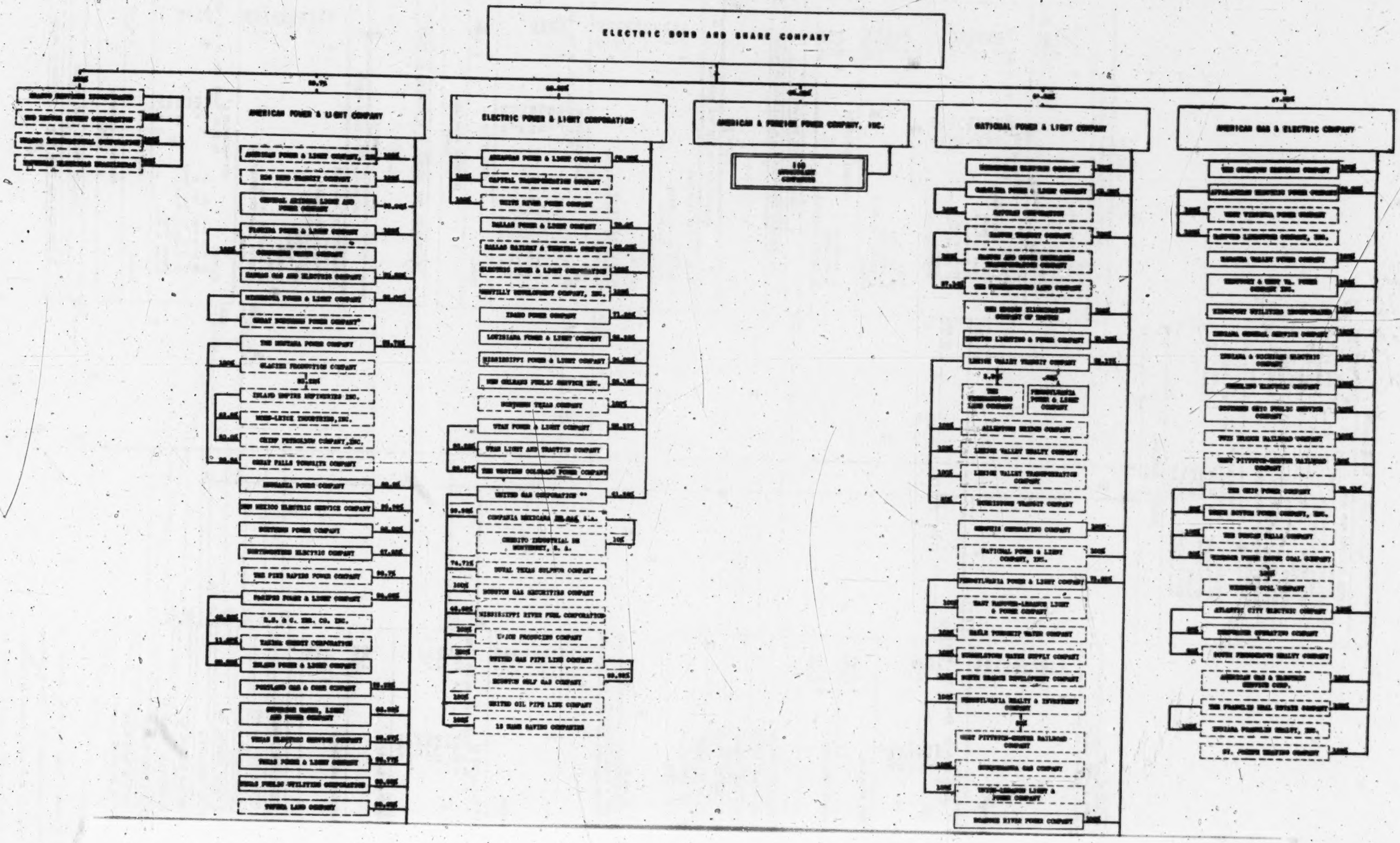
For ORVAL L. DuBOIS, *Secretary.*

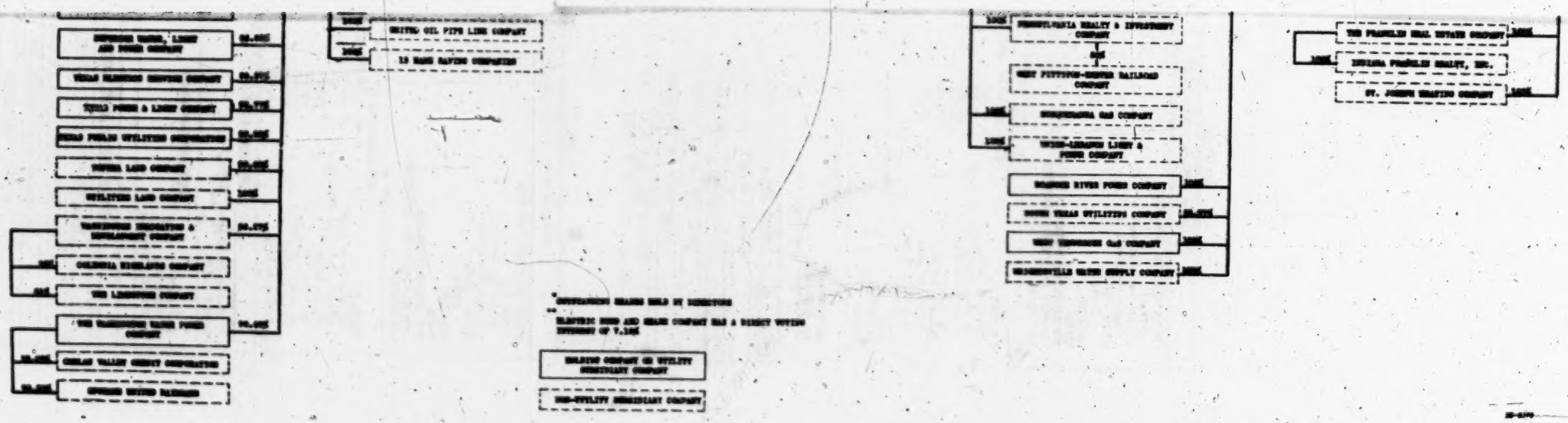
[SEAL]

By NELLYE A. THORSEN, *Assistant to the Secretary.*

ELECTRIC BOND AND SHARE COMPANY

CORPORATE CHART SHOWING PERCENTAGE OF VOTING POWER
AS OF DECEMBER 31, 1941

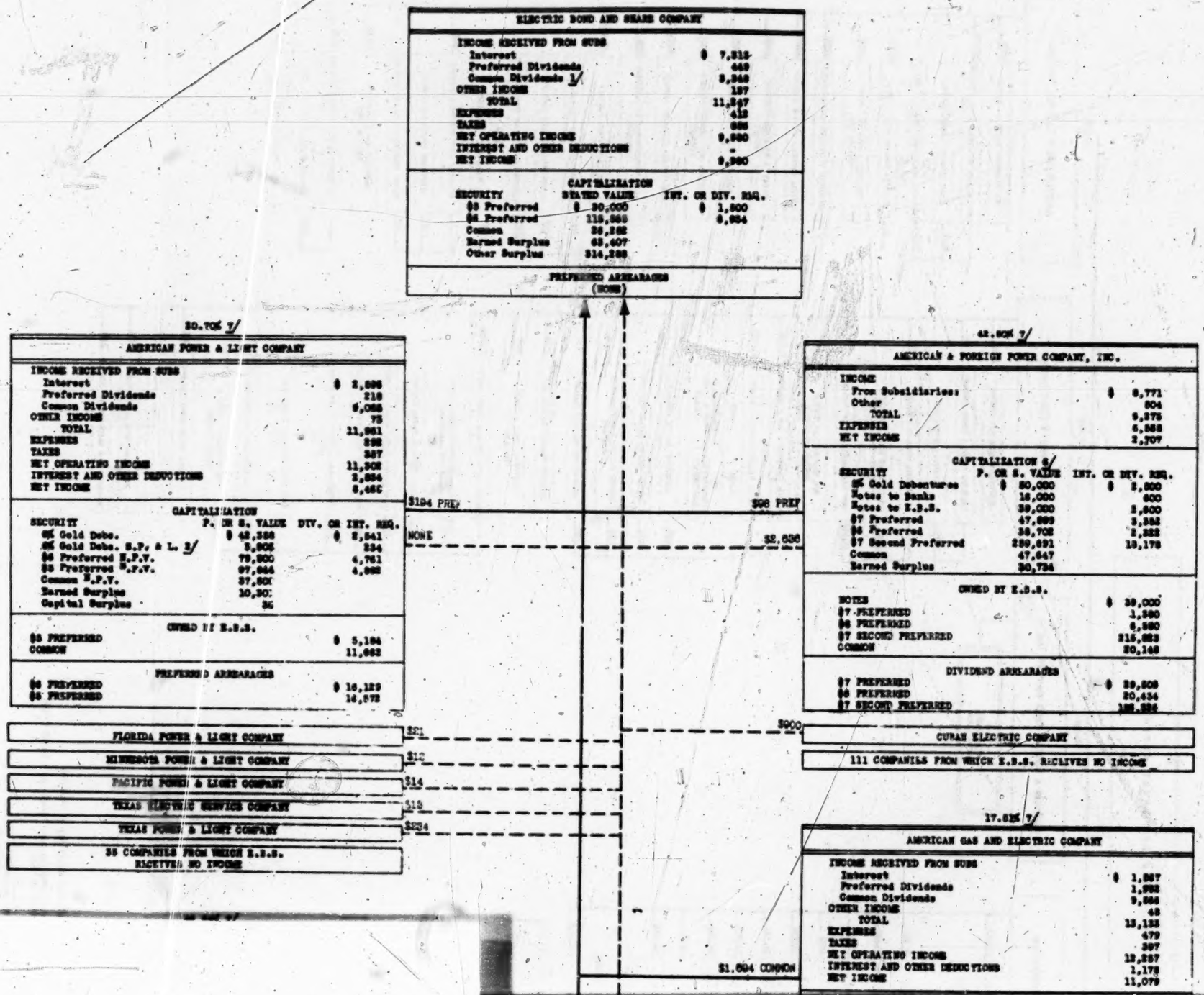


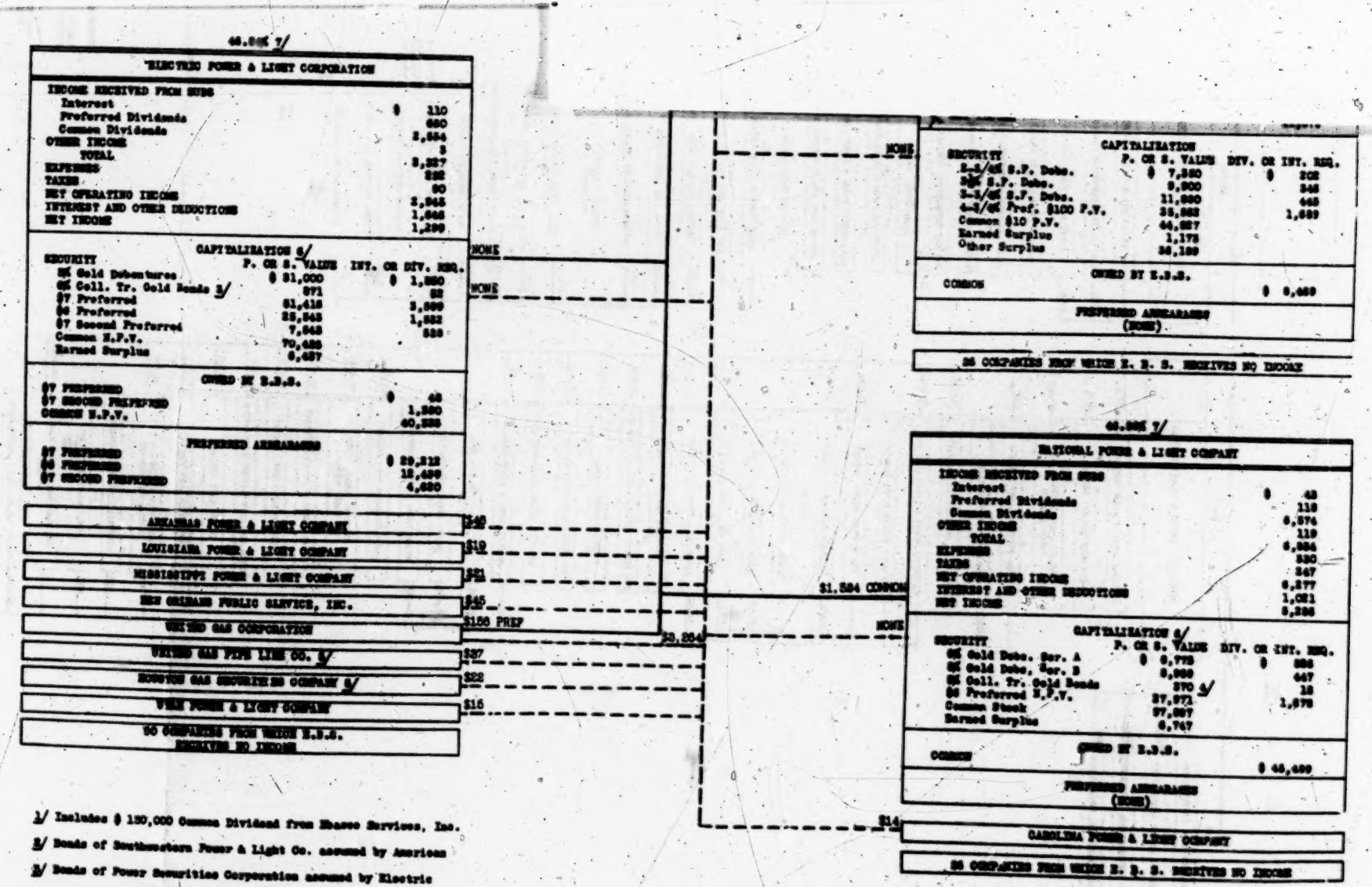

UNITED OIL PIPE LINE COMPANY
13 NAME SAVING COMPANIES
COLUMBIA HIGHLANDS COMPANY
THE LIMESTONE COMPANY
OCHLAS VALLEY CREDIT CORPORATION
SPOKANE UNITED RAILROADS
PENNSYLVANIA REALTY & INVESTMENT COMPANY
WEST PITTSTON-EXETER RAILROAD COMPANY
SUSQUEHANNA GAS COMPANY
UNION-LEBANON LIGHT & POWER COMPANY
ROANOKE RIVER POWER COMPANY
SOUTH TEXAS UTILITIES COMPANY
WEST TENNESSEE GAS COMPANY
BRIGHTSVILLE WATER SUPPLY COMPANY
THE FRANKLIN REAL ESTATE COMPANY
INDIANA FRANKLIN REALTY, INC.
ST. JOSEPH HEATING COMPANY
HOLDING COMPANY OR UTILITY SUBSIDIARY COMPANY
NON-UTILITY SUBSIDIARY COMPANY

ELECTRIC BOND AND SHARE COMPANY

ANALYSIS OF SOURCES OF INCOME - YEAR 1940

(000 OMITTED)





46.8[illegible]% 7/

ELECTRIC POWER & LIGHT CORPORATION

INCOME RECEIVED FROM SUBS	
Interest	$ 110
Preferred Dividends	660
Common Dividends	2,554
OTHER INCOME	3
TOTAL	3,327
EXPENSES	232
TAXES	90
NET OPERATING INCOME	2,945
INTEREST AND OTHER DEDUCTIONS	1,646
NET INCOME	1,299

CAPITALIZATION 6/

SECURITY	P. OR S. VALUE	INT. OR DIV. REQ.
5% Gold Debentures	$ 31,000	$ 1,550
6% Coll. Tr. Gold Bonds 3/	871	52
$7 Preferred	51,416	3,599
$6 Preferred	25,543	1,532
$7 Second Preferred	7,543	528
Common N.P.V.	70,425	
Earned Surplus	6,437	

OWNED BY E.B.S.

$7 PREFERRED	$ 48
$7 SECOND PREFERRED	1,380
COMMON N.P.V.	40,335

PREFERRED ARREARAGES

$7 PREFERRED	$ 29,212
$6 PREFERRED	12,439
$7 SECOND PREFERRED	4,620

NONE

NONE

ARKANSAS POWER & LIGHT COMPANY — $48

LOUISIANA POWER & LIGHT COMPANY — $19

MISSISSIPPI POWER & LIGHT COMPANY — $21

NEW ORLEANS PUBLIC SERVICE, INC. — $45

UNITED GAS CORPORATION — $156 PREF

UNITED GAS PIPE LINE CO. 5/ — $37

HOUSTON GAS SECURITIES COMPANY 5/ — $22

UTAH POWER & LIGHT COMPANY — $15

DO COMPANIES FROM WHICH E.B.S. RECEIVES NO INCOME

$3,264

$1,584 COMMON

NONE

$14

CAPITALIZATION

SECURITY	P. OR S. VALUE	DIV. OR INT. REQ.
2-3/4% S.F. Debs.	$ 7,350	$ 202
3½% S.F. Debs.	9,900	346
3-3/4% S.F. Debs.	11,880	445
4-3/4% Pref. $100 P.V.	35,882	1,689
Common $10 P.V.	44,827	
Earned Surplus	1,173	
Other Surplus	38,189	

OWNED BY E.B.S.

COMMON	$ 8,489

PREFERRED ARREARAGES (NONE)

26 COMPANIES FROM WHICH E. B. S. RECEIVES NO INCOME

46.8[illegible]% 7/

NATIONAL POWER & LIGHT COMPANY

INCOME RECEIVED FROM SUBS	
Interest	$ 43
Preferred Dividends	118
Common Dividends	6,574
OTHER INCOME	119
TOTAL	6,854
EXPENSES	330
TAXES	247
NET OPERATING INCOME	6,277
INTEREST AND OTHER DEDUCTIONS	1,021
NET INCOME	5,256

CAPITALIZATION 6/

SECURITY	P. OR S. VALUE	DIV. OR INT. REQ.
6% Gold Debs. Ser. A	$ 6,775	$ 386
5% Gold Debs. Ser. B	8,989	447
5% Coll. Tr. Gold Bonds	370 4/	18
$6 Preferred N.P.V.	37,971	1,878
Common Stock	57,887	
Earned Surplus	6,747	

OWNED BY E.B.S.

COMMON	$ 45,489

PREFERRED ARREARAGES (NONE)

CAROLINA POWER & LIGHT COMPANY

26 COMPANIES FROM WHICH E. B. S. RECEIVES NO INCOME

1/ Includes $ 150,000 Common Dividend from Ebasco Services, Inc.

2/ Bonds of Southwestern Power & Light Co. assumed by American

3/ Bonds of Power Securities Corporation assumed by Electric

4/ Bonds of Lancaster County Railway and Light Co. assumed by National

5/ Subsidiary of United Gas Corporation

6/ All classes of stock are carried in the Capital Stock Account of the issuer at one figure. For the purposes of this chart preferred stocks have arbitrarily been assigned liquidating values, and the balance of the Capital Stock Account assigned to Common Stock.

7/ Indicates percent of voting control exercised by Electric Bond and Share Company at December 31, 1940.

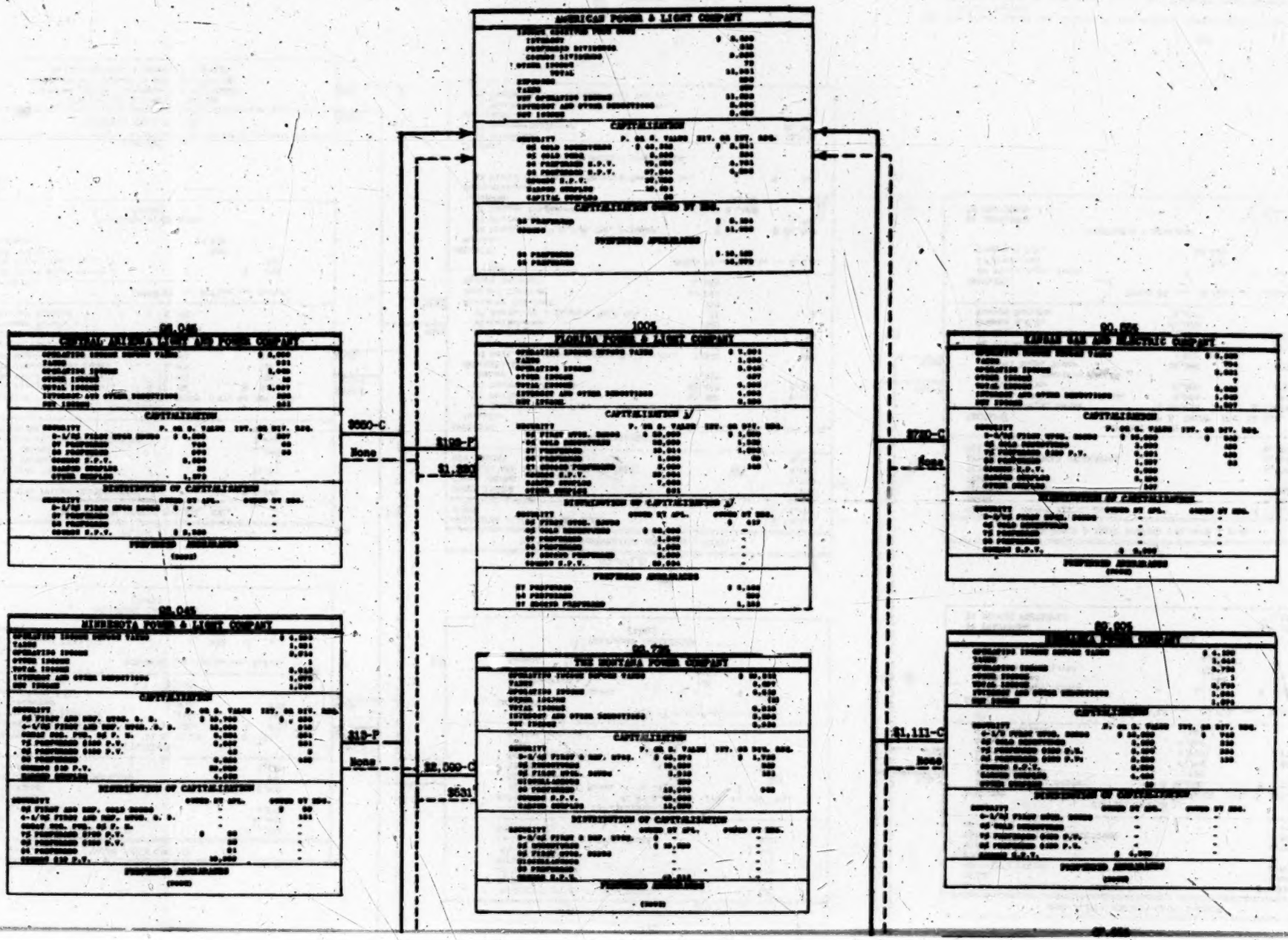
INTEREST PAYMENTS

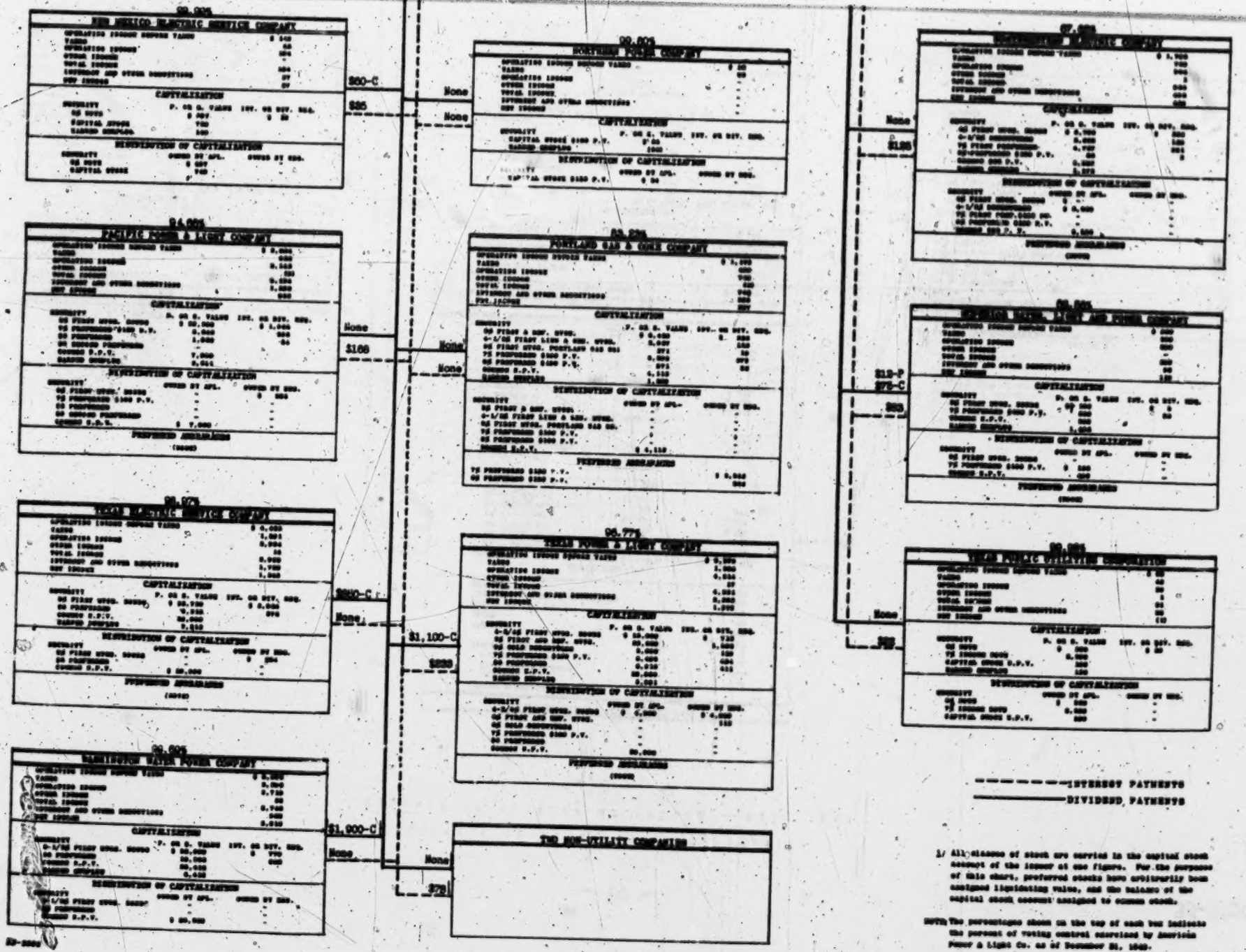
DIVIDEND PAYMENTS

ANALYSIS OF SOURCES OF INCOME - YEAR 1940

AMERICAN POWER & LIGHT COMPANY

(000 - OMITTED)





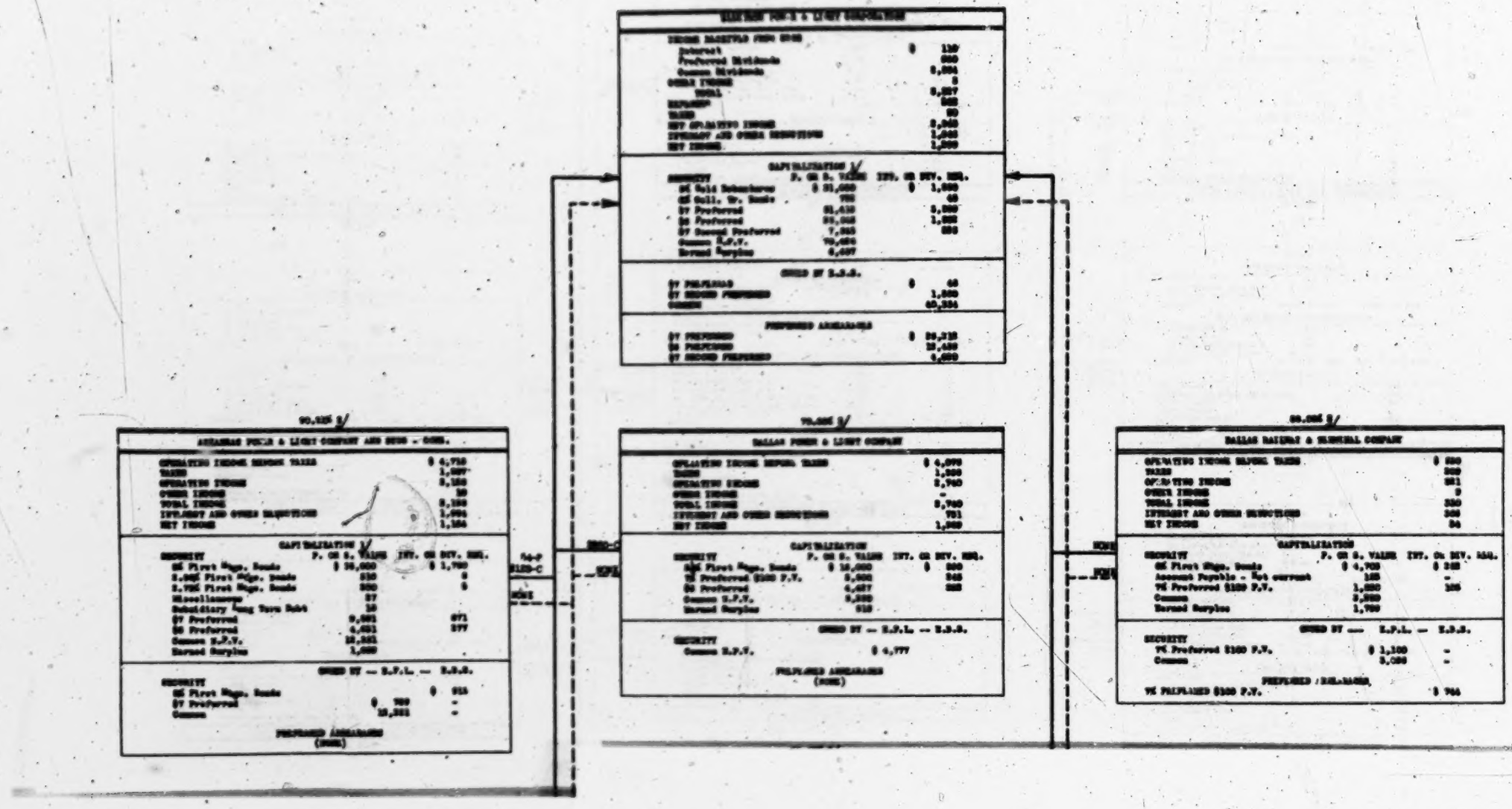
1/ All classes of stock are carried in the capital stock account of the issuer at one figure. For the purposes of this chart, preferred stocks have arbitrarily been assigned liquidating value, and the balance of the capital stock account assigned to common stock.

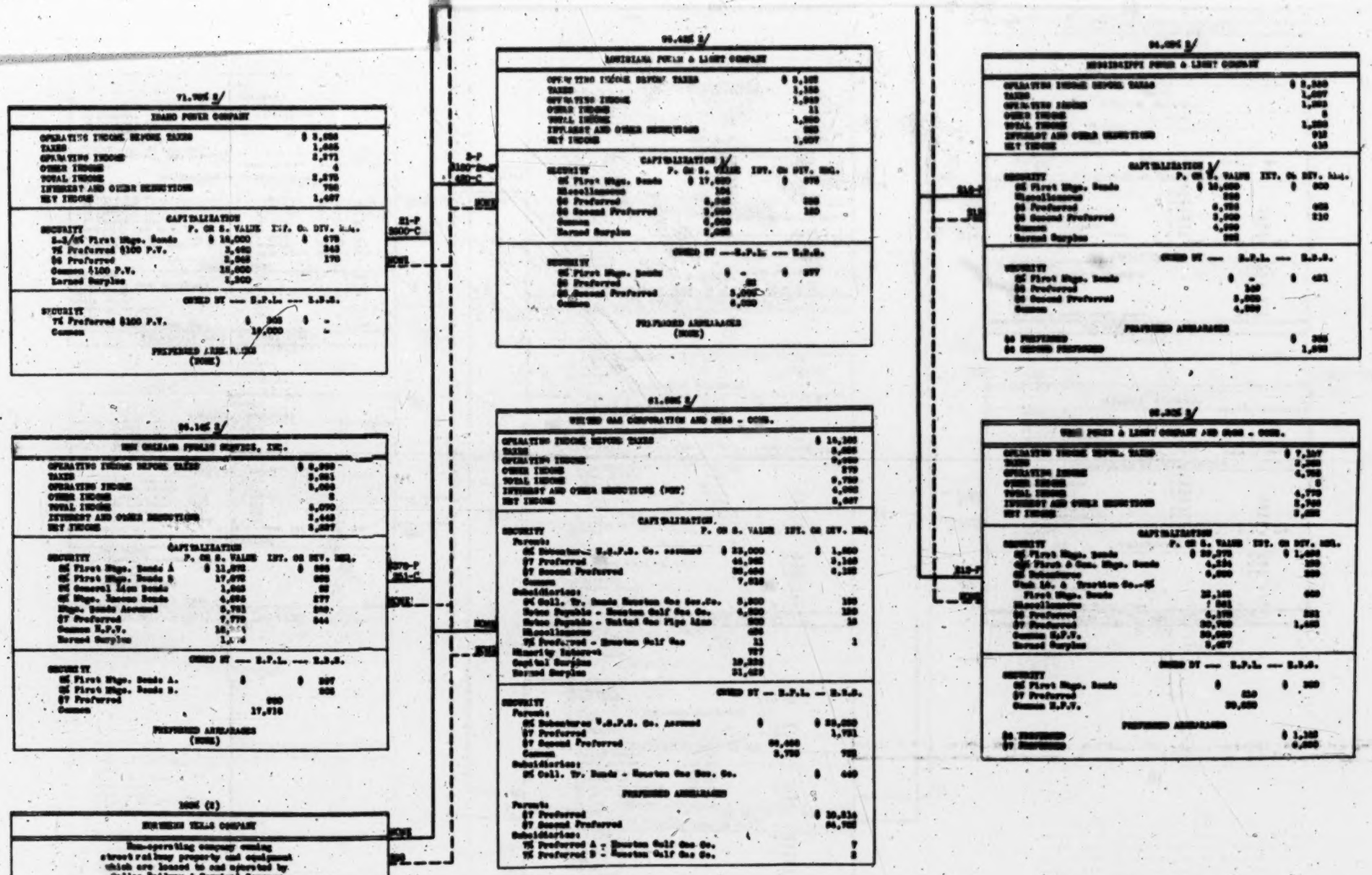
NOTE: The percentages shown on the top of each box indicate the percent of voting control exercised by American Power & Light Co. as of December 31, 1940.

ELECTRIC POWER & LIGHT CORPORATION

ANALYSIS OF SOURCES OF INCOME - YEAR 1948

(000 OMITTED)





(1) All stock issues are carried in the capital stock account of the issuer at par amount. For the purpose of this chart the preferred stocks have arbitrarily been assigned their liquidating values and the remainder of the capital stock account assigned to the common.

(2) Voting power held by Electric Power & Light Corporation at December 31, 1940.

NUMBER OF SUBSIDIARIES, CONSOLIDATED CAPITALIZATION AND CONSOLIDATED ASSETS OF EACH OF NINE AND SHARE'S SUB-HOLDING COMPANY SUBSIDIARIES — DECEMBER 31, 1941

	Number of Subsidiaries	Consolidated Capitalization: Long-Term Debt	Preferred Stocks: Holding Company	Preferred Stocks: Subsidiaries	Common Stocks (Sub-Holding Companies)	Minority Interest (Subsidiaries)	Surplus 1/	Total	Consolidated Assets
American Gas and Electric Company	25	238,210,000	$ 35,562,300	$ 65,700,400	$ 44,827,370	$ none	$ 66,106,128 2/	$ 450,486,198	$ 586,071,097
Unpaid cumulative dividends on preferred stocks			none	none			-		
American Power & Light Company	36	357,286,072	177,145,326	111,622,100	37,434,351	621,193	49,619,895	733,728,937	851,251,525
Unpaid cumulative dividends on preferred stocks			35,114,748	3,615,226			(38,730,014)		
American & Foreign Power Company, Inc. 3/	110	141,532,789	346,288,445	36,316,662	47,651,807	7,849,939	52,647,772	632,287,614	705,883,738
Unpaid cumulative dividends on preferred stocks			258,697,786	12,923,743			(272,621,529)		
Electric Power & Light Corporation 3/	38	290,821,615 4/	84,575,467	117,405,300	70,468,872	2,534,194	51,990,703	617,995,951	749,183,549
Unpaid cumulative dividends on preferred stocks			50,889,325	17,803,228			(68,692,553)		
National Power & Light Company	28	224,853,450	27,971,600	88,903,409	97,897,495	1,747	15,865,447	455,443,148	542,078,708
Unpaid cumulative dividends on preferred stocks			none	135,454			(135,454)		
Total	237	$1,252,703,926	$1,016,345,297	$466,903,972	$298,279,895	$11,007,073	$[illegible]	$2,890,231,596	$3,434,456,774

1/ Unpaid cumulative dividends on preferred stocks of subsidiaries held by public are charged to surplus in consolidation and segregated on the consolidated balance sheets. For the purpose of this schedule such amounts have been reinstated in surplus and deducted as shown.

2/ Includes:

Premium on Preferred Stock - Subsidiaries	$2,678,822
Net Excess of Equity in Assets of Subsidiaries Consolidated over Investment in Subsidiaries Consolidated, exclusive of Earned Surplus	[illegible]
	$[illegible]

3/ Does not include Option Warrants.

4/ Includes: United Gas Corporation, Unsecured Note - 6% due on Demand, $25,935,000; and Advance on Open Account - 6% on Demand, $2,000,000; both owed to Electric Bond and Share Company.

( ) Indicates red figure.

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APPENDIX D

STATED VALUE ON BOOKS OF BOND AND SHARE'S SUB-HOLDING COMPANY SUBSIDIARIES OF SECURITIES OWNED BY BOND AND SHARE, PERCENTAGE OF TOTAL CONSOLIDATED CAPITALIZATION AND PERCENTAGE OF VOTING POWER OF SUCH SECURITIES TO TOTAL PER CONSOLIDATED BALANCE SHEETS — DECEMBER 31, 1941

	Consolidated Capitalization Owned by Bond and Share							
	Preferred Stocks							
	Long-Term Debt	Holding Company	Subsidiaries	Common Stocks	Surplus	Total	Per Cent of Total Capitalization	Per Cent of Voting Power Represented
American Gas and Electric Company	$ -	$ -	$ -	$ 8,469,850	$ 12,490,092	$ 20,959,942	4.65	17.51
Unpaid cumulative dividends on preferred stocks		-	-					
American Power & Light Company	6,120,000	5,184,000	-	11,661,668	3,392,148	27,300,706	3.72	20.70
Unpaid cumulative dividends on preferred stocks		942,840	-					
American & Foreign Power Co., Inc. 1/	57,400,000	223,784,510	-	20,147,184	(92,582,104)	383,404,061	60.6	42.28
Unpaid cumulative dividends on preferred stocks		174,654,471	-					
Electric Power & Light Corporation 1/	56,288,000 2/	1,439,000	1,731,000	40,336,973	(9,674,788)	91,457,934	14.81	46.83
Unpaid cumulative dividends on preferred stocks		979,288	358,461					
National Power & Light Company	-	-	-	45,567,106	7,323,792	52,890,898	11.61	46.56
Unpaid cumulative dividends on preferred stocks		-	-					
Total	$119,808,000	$406,984,109	$ 2,089,461	$126,182,781	$(79,050,860)	$576,013,541	19.93	

1/ Does not include option warrants.

2/ Includes; United Gas Corporation, Unsecured Note - 6% due on Demand, $25,925,000; and Advances on Open Account - 6% due on Demand $2,000,000.

SCHEDULE SHOWING BOND AND SHARE'S INTEREST IN THE CAPITALIZATION OF AMERICAN AND AMERICAN'S SUBSIDIARIES, AS PER BOOKS AND AS ADJUSTED, DECEMBER 31, 1941

	As Per Books of American (1)	Adjusted to Book Value as Per Subsidiaries Books 1/ (2)	Adjusted to Book Value and for Indicated System Write-ups 2/ (3)	Adjusted to Book Value, for Indicated System Write-ups and for Depreciation 3/ (4)
Interest of Bond and Share in American				
1. Capitalization of American including surplus 4/	$270,493,611	$323,744,487	$135,666,471	$ 41,095,603
2. Bond and Share's interest	9,966,795	26,547,603	-	-
3. Per cent of Bond and Share's interest to total	3.68%	8.20%	-	-
Interest of American in its subsidiaries				
4. Capitalization of American's subsidiaries including surplus 4/		729,143,155	540,717,768	445,896,726
5. Book Value of American's investments in its subsidiaries (as per subsidiaries' books and as adjusted) 5/		303,837,930	115,759,914	21,189,046
6. Book value of American's investment (as per subsidiaries books and as adjusted) as a per cent of total capitalization of its subsidiaries (5 ÷ 4)		41.67%	21.41%	4.75%
7. Carrying value of American's investment in its subsidiaries as per books of American 5/		250,587,054	250,587,054	250,587,054
8. Excess of book value of American's investments (as per subsidiaries' books and as adjusted) over carrying value on American's books (5 - 7)		53,250,876	(134,827,140)	(229,398,008)
Interest of Bond and Share in American's Subsidiaries				
9. Bond and Share's interest in capitalization of American's subsidiaries through American (5 x 3)		24,914,710	-	-
10. Per cent of Bond and Share's interest in capitalization of American's subsidiaries through American (9 ÷ 4)		3.42%	-	-
11. Bond and Share's direct interest in capitalization of American's subsidiaries		6,120,000	6,120,000	6,120,000
12. Total interest of Bond and Share in capitalization of American's subsidiaries		31,034,710	6,120,000	6,120,000
13. Per cent of Bond and Share's total interest capitalization of American's subsidiaries (12 ÷ 4)		4.26%	1.13%	1.37%

1/ This adjustment adds the excess of the book value of American's investment as per books of American's subsidiaries over the amount at which these investments are carried in American's investment account.

2/ Adjusted for 1/ and to eliminate indicated system write-ups.

3/ Adjusted for 2/ and to eliminate the excess of depreciation claimed or allowed for income tax purposes over property retirement appropriations as per books.

4/ Adjusted for preferred dividend arrearages, to eliminate reacquired preferred stocks, and to reflect preferred stocks at liquidating values.

5/ Exclusive of $950,000 notes and advances of Glacier Production Company, an indirect subsidiary of American.

( ) Indicates Red Figure

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SCHEDULE COMPARING TOTAL ASSETS, BOOK CAPITALIZATION, AND ADJUSTED CAPITALIZATION OF AMERICAN'S SUBSIDIARIES AND SHOWING AMERICAN'S AND BOND AND SHARE'S INTEREST IN SUCH CAPITALIZATION, DECEMBER 31, 1941

Subsidiaries of American	Total Assets As Per Books	Capitalization As Per Books 1/				Adjustment for Indicated System Write-ups	Capitalization As Adjusted for Indicated System Write-ups			
		Total	Representing Securities Owned by American	Representing Bond and Share's Interest			Total	Representing Securities Owned by American	Representing Bond and Share's Interest	
				Through American 2/	Direct				Through American	Direct
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
Big Bend Transit Company	$ 508,734	$ 508,734	$ 508,734	$ 41,716	$ -	$ -	$ 508,734	$ 508,734	$ -	$ -
Central Arizona Light and Power Company	17,504,221	12,063,787	3,887,687	318,790	-	-	12,063,787	3,887,687	-	-
Florida Power & Light Company	140,036,654	124,706,306	58,439,106	4,792,007	417,000	36,883,684	87,822,622	21,555,422	-	417,000
Kansas Gas and Electric Company	41,671,964	35,196,471	8,560,371	701,950	-	1,846,194	33,350,277	6,714,177	-	-
Minnesota Power & Light Company	83,487,824	74,024,334	25,308,809	2,075,322	251,000	22,055,786	51,968,548	3,253,129	-	251,000
The Montana Power Company	155,506,757	139,129,356	73,939,843	6,063,067	-	57,000,000	82,129,356	17,079,515	-	-
Nebraska Power Company	43,506,482	36,861,099	9,088,757	745,278	-	5,366,453	30,994,586	3,421,816	-	-
New Mexico Electric Service Company	1,644,501	1,459,055	1,459,055	119,643	-	750,669	708,386	708,386	-	-
Northern Power Company	786,613	737,872	737,872	60,506	-	273,067	464,805	464,805	-	-
Northwestern Electric Company	23,435,981	18,854,680	7,372,580	604,552	-	3,500,000	15,354,680	3,872,580	-	-
Pacific Power & Light Company	46,060,021	38,764,418	11,563,518	948,208	285,000	4,164,728	34,599,690	7,398,790	-	285,000
Pike Rapids Power Company	52,110	52,085	51,408	4,215	-	-	52,085	51,408	-	-
Portland Gas & Coke Company	25,793,285	21,218,200	2,348,256	192,557	-	300,000	20,913,200	2,048,266	-	-
Superior Water Light and Power Company	5,573,179	4,192,105	3,747,847	307,323	-	1,255,626	2,936,479	2,493,226	-	-
Texas Electric Service Company	83,504,062	72,267,993	32,276,263	2,646,654	254,000	33,014,107	39,253,886	(737,402)	-	254,000
Texas Power & Light Company	89,152,661	80,982,852	28,896,252	2,369,493	4,913,000	19,000,000	61,982,852	9,896,252	-	4,913,000
Texas Public Utilities Corporation	3,212,793	2,881,543	2,881,543	236,287	-	397,308	2,484,235	2,484,235	-	-
Topeka Land Company	331,313	323,503	323,503	26,527	-	-	323,503	323,503	-	-
Utilities Land Company	1,318,240	1,313,513	1,313,513	107,708	-	-	1,313,513	1,313,513	-	-
Washington Irrigation & Development Company	344,572	343,566	343,174	28,140	-	-	343,566	343,174	-	-
The Washington Water Power Company	77,328,105	63,261,743	30,789,839	2,524,767	-	2,117,765	61,143,978	28,678,698	-	-
Total	$840,760,062	$729,343,155	$303,837,930	$ 24,914,710	$ 6,120,000	$188,425,387	$540,717,768	$115,759,914	$ -	$ 6,120,000

1/ Including surplus, and as adjusted for preferred dividend arrearages, to eliminate reacquired preferred stocks, and to reflect preferred stocks at liquidating values.

2/ 8.20% of column (3) - see Item 3, Column (2) of Appendix B-1.

( ) Indicates red figure.

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APPENDIX B-2

Capitalization As Adjusted for Indicated System Write-ups and for Excess of Depreciation for Income Tax Purposes over Property Retirement Appropriations As Per Books

Adjustment for Depreciation	Total	Representing Securities Owned by American	Representing Bond and Share's Interest	
			Through American	Direct
(11)	(12)	(13)	(14)	(15)
$ -	$ 508,734	$ 508,734	$ -	$ -
(307,114)	12,370,901	4,194,801	-	-
22,165,213	65,657,409	(609,791)	-	417,000
5,207,857	28,142,420	1,506,320	-	-
5,322,873	42,645,675	(6,069,697)	-	251,000
8,239,634	73,889,722	8,860,068	-	-
6,092,842	24,901,744	(2,463,808)	-	-
77,498	630,888	630,888	-	-
221,702	243,103	243,103	-	-
3,565,866	11,788,814	306,714	-	-
3,475,256	31,124,434	3,923,534	-	285,000
-	52,085	51,408	-	-
4,575,245	16,342,955	(2,526,814)	-	-
747,705	2,188,774	1,746,119	-	-
7,284,133	31,969,753	(8,021,437)	-	254,000
16,894,713	45,088,139	(6,998,461)	-	4,913,000
268,965	2,215,270	2,215,270	-	-
-	323,503	323,503	-	-
-	1,313,513	1,313,513	-	-
-	343,566	343,174	-	-
6,988,454	54,155,324	21,711,905	-	-
$ 94,821,062	$445,896,726	$ 21,189,046	$ -	$ 6,120,000

APPENDIX F-1

Schedule Showing Bond and Share's Interest in the Capitalization of Electric and Electric's Subsidiaries, as Per Books and as Adjusted, December 31, 1941.

	As Per Books Of Electric (1)	Adjusted to Book Value As Per Subsidiaries' [illegible] 1/ (2)	Adjusted to Book Value and for Indicated System Write-ups 2/ (3)	Adjusted to Book Value Indicated System Write-ups and for Depreciation and Depletion 3/ (4)
Interest of Bond and Share in Electric 4/				
1. Capitalization of Electric including surplus	$192,189,868	$264,196,182	$201,081,908	$ 81,388,170
2. Bond and Share's interest	17,558,108	58,785,971	22,649,268	-
3. Percent Bond and Share's interest to total	9.14%	22.25%	11.26%	-
Interest of Electric in its subsidiaries				
4. Capitalization of Electric's subsidiaries including surplus 4/		653,981,088	590,749,222	469,782,265
5. Book value of Electric's investments in its subsidiaries (as per subsidiaries' books and as adjusted)		256,415,384	193,301,010	73,607,372
6. Book value of Electric's investments (as per subsidiaries' books and as adjusted) as a percent of total capitalization of subsidiaries (5 ÷ 4).		39.21%	32.72%	15.67%
7. Carrying value of Electric's investments in its subsidiaries on books of Electric		184,409,070	184,409,070	184,409,070
8. Excess of book value of Electric's investments (as per subsidiaries' books and as adjusted) over carrying value on Electric's books (5 - 7)		72,006,314	8,891,940	(110,801,698)
Interest of Bond and Share in Electric's subsidiaries				
9. Bond and Share's interest in capitalization of Electric's subsidiaries through Electric (5 x 3)		57,052,423	21,765,694	-
10. Percent Bond and Share's interest in capitalization of Electric's subsidiaries through Electric (9 ÷ 4)		8.72%	3.68%	-
11. Bond and Share's direct interest in capitalization of Electric's subsidiaries		58,377,461	58,377,461	58,377,461
12. Total interest of Bond and Share in capitalization of Electric's subsidiaries (9 + 11)		115,429,884	80,143,155	58,377,461
13. Percent Bond and Share's total interest in capitalization of Electric's subsidiaries (12 ÷ 4)		17.65%	13.57%	12.43%

1/ The adjustment adds the excess of book value of Electric's investments in its subsidiaries as per subsidiaries' books over the amount at which these investments are carried in the investment account of Electric.

2/ Adjusted for 1/ and to eliminate the indicated system write-ups.

3/ Adjusted for 1/ and to eliminate the indicated system write-ups plus the excess of depreciation and depletion for tax purposes over accruals per books.

4/ Adjusted for preferred dividend arrearages, to eliminate reacquired capital stock, and to reflect preferred stocks at liquidating values.

( ) Indicates red figure.

SCHEDULE COMPARING TOTAL ASSETS, BOOK CAPITALIZATION AND ADJUSTED CAPITALIZATION OF ELECTRIC'S SUBSIDIARIES AND SHOWING ELECTRIC'S AND BOND AND SHARE'S INTEREST IN SUCH CAPITALIZATION, DECEMBER 31, 1941

Subsidiaries of Electric	Total Assets As Per Books	Capitalization As Per Books 1/				Adjustment For Indicated System Write-ups	Capitalization as Adjusted for Indicated System Write-ups			
		Total	Representing Securities Owned By Electric	Representing Bond and Share's Interest Through Electric 3/	Direct		Total	Representing Securities Owned By Electric	Representing Bond and Share's Interest Through Electric 4/	Direct
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
Arkansas Power & Light Company 2/	$ 76,011,879	$ 64,237,910	$ 15,247,048	$ 3,392,468	$ 915,000	$ 3,875,244	$ 60,362,666	$ 11,371,804	$ 1,280,463	$ 915,000
Dallas Power & Light Company	38,425,961	30,084,423	5,652,304	1,257,438	—	1,061,262	29,023,161	4,686,556	527,706	—
Dallas Railway & Terminal Company	12,270,880	11,443,863	5,716,871	1,272,004	—	—	11,443,863	5,716,871	643,720	—
Gentilly Development Company, Inc.	1,542,628	1,342,628	1,342,628	343,295	—	—	1,342,628	1,342,628	173,700	—
Idaho Power Company	48,382,805	42,604,195	18,545,495	4,126,373	—	9,523,401 5/	33,080,794	9,022,094	1,015,888	—
Louisiana Power & Light Company	42,211,729	34,801,488	11,264,343	2,506,316	377,000	9,632,002	25,169,486	1,632,341	183,802	377,000
Mississippi Power & Light Company	38,010,315	32,645,490	9,526,762	2,119,704	431,000	6,733,234	25,912,256	2,793,528	314,551	431,000
New Orleans Public Service Inc.	80,743,376	68,770,990	20,902,757	4,650,863	900,000	452,010	68,318,980	20,472,725	2,305,229	900,000
Northern Texas Company	2,060,756	2,031,342	2,031,342	451,974	—	—	2,031,342	2,031,342	228,729	—
United Gas Corporation 2/	309,434,115	256,334,928	140,008,906	31,151,982	55,454,461	— 6/	256,334,928	140,008,906	15,765,003	55,454,461
Utah Power & Light Company 2/	123,147,286	109,483,831	25,976,928	5,779,866	300,000	31,954,713	77,529,118	(5,977,785)	(673,099)	300,000
Total	$772,751,730	$663,981,088	$256,415,384	$57,052,423	$58,377,461	$63,231,866	$590,749,222	$191,303,010	$21,765,694	$58,377,461

1/ Including surplus, and as adjusted for preferred dividend arrearages, to eliminate reacquired preferred stocks, and to reflect preferred stocks at liquidating values.

2/ Consolidated basis.

3/ 22.23% of Column (3) - see Item 3, Column (2) of Appendix F-1.

4/ 11.26% of Column (8) - see Item 3, Column (3) of Appendix F-1.

( ) Indicates red figure.

APPENDIX F-2

ADJUSTED
TRIC'S AND
R 31, 1941

as Adjusted for ...tem Write-ups			Capitalization as Adjusted for Indicated System Write-ups and for Excess of Depreciation and Depletion for Tax Purposes Over Accruals for Retirements and Depletion Per Books			
Representing Bond and Share's Interest		Adjustment for Depreciation and Depletion		Representing Securities Owned By Electric	Representing Bond and Share's Interest	
Through Electric 4/	Direct		Total		Through Electric	Direct
(9)	(10)	(11)	(12)	(13)	(14)	(15)
$ 1,280,465	$ 915,000	$ 3,952,249	$ 56,410,417	$ 7,419,555	—	$ 915,000
527,706	—	4,563,521	24,459,640	533,752	—	—
643,720	—	2,553,110	8,890,753	3,306,421	—	—
173,700	—	—	1,542,628	1,542,628	—	—
1,015,888	—	3,418,300	29,662,494	5,603,794	—	—
183,802	377,000	1,450,500	23,718,986	181,841	—	377,000
314,551	431,000	2,678,529	23,233,727	114,999	—	431,000
2,305,229	900,000	—	68,318,980	20,472,725	—	900,000
228,729	—	—	2,031,342	2,031,342	—	—
15,765,003	55,454,461	80,268,739 7/	176,066,189	60,460,109	—	55,454,461
(673,099)	300,000	22,082,009	55,447,109	(28,059,794)	—	300,000
$21,765,694	$58,377,461	$120,966,957	$469,782,265	$73,607,372	—	$58,377,461

values.

5/ Amount determined by Idaho Power Company to be excess of recorded value of properties over "original cost."

6/ No adjustment for write-up in United Gas Corporation in view of pendency of United Gas Corporation proceeding, File 70-314.

7/ Based on depreciation, depletion, etc. claimed for income tax purposes, no final findings concerning amounts allowable having been made by the Bureau of Internal Revenue.

Summary of Manner and Cost of Bond and Share's Acquisitions of Common Stock of American

APPENDIX G

	Number of Shares Acquired	Cash Cost	Stock Dividends	Appreciation	Ledger Value
Shares Acquired Prior to 1/1/28					
A. At organization of American	162,110.00	$ -	$ -	$ 243,165.00	$ 243,165.00
B. By exchange for common stock of Southwestern Utilities Corporation (1914)	35,425.00	62,550.00	-	150,000.00	212,550.00
C. By sale of securities of Omaha Electric Light and Power Company to American (1917)	50,000.00	-	-	-	-
D. Stock dividends received	79,673.64	-	796,736.40	-	796,736.40
E. By exchange for $1,182,400 American debentures	118,240.00	1,086,569.58	-	(21,776.58)	1,064,793.00
F. By exchange for Bonbright & Company stock	2,300.00	21,442.36	-	1,557.64	23,000.00
G. Cash purchases	14,013.82	205,803.85	-	126,731.91	332,535.76
H. Disposed of in exchange for other securities and for services and other intangibles	(3,300.00)	-	-	(11,550.00)	(11,550.00)
I. Net appreciation at year ends	-	-	-	3,315,560.75	3,315,560.75
Sub-total	458,462.46	$ 1,376,365.79	$ 796,736.40	$3,803,688.72	$ 5,976,790.91
Shares Acquired Subsequent to 1/1/28					
A. By purchase on the open market	105,700.12	$ 8,025,136.57	$ -	$ 1,198.99	$ 8,026,335.56
B. By merger with Electric Investors, Inc. (1929)	68,704.00	1,478,682.94 1/	1,168,429.87 2/	1,767,119.19 3/	4,414,232.00
C. Stock dividends received	304,342.42	-	3,765,772.54	-	3,765,772.54
D. Directors' qualifying shares repurchased	12.00	65.00	-	-	65.00
Sub-total	478,758.54	$ 9,503,884.51	$4,934,202.41	$1,768,318.18	$16,206,405.10
Total	937,221.00	$10,880,250.30	$5,730,938.81	$5,572,006.90	$22,183,196.01

1/ Cash cost to Electric Investors, Inc., and its predecessor Electrical Utilities Corp.

2/ Stock dividends received by Electric Investors, Inc., and its predecessor, Electrical Utilities Corp.

3/ Excess of valuation recorded on books of Bond and Share over ledger value as recorded on books of Electric Investors, Inc., plus net appreciation recorded by Electric Investors, Inc., and its Predecessor, Electrical Utilities Corp.

( ) Indicates Red Figure.

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APPENDIX H

SUMMARY OF MANNER AND COST OF BOND AND SHARE'S ACQUISITIONS OF COMMON STOCK OF ELECTRIC

	Number of Shares	Ledger Value	Cash Cost
I. Shares Acquired and Disposed of in Connection with Organization of Electric			
Acquisitions			
A. Pursuant to L. W. deBuys Agreement of March 12, 1925	310,000	$ 1.00	$(6,498,690.27)
B. Received for 56,193 shares of Utah Securities Corporation Common Stock	224,772	58,440.72	50,292.35
C. Net balance of shares acquired with $7 Preferred Stock in blocks (1925-1928)	19,534	-	-
D. Unsold shares remaining from those made available for sale with Second Preferred Stock of Electric	4,740	36,216.00 1/	36,216.00 1/
Total Acquisitions	559,046	94,657.72	
Disposals			
A. Pursuant to L. W. DeBuys Agreement of March 12, 1925 - made available for sale with preferred stock of Electric	200,000	$ -	$ -
B. Made available for sale with Second Preferred Stock of Electric to friendly interests (1925)	60,000	-	-
C. To Charles Hayden for "services"	705	-	-
Total Disposals	260,705	-	
Balance	298,341	$ 94,657.72	
II. Shares Acquired and Disposed of Subsequent to Organization of Electric			
Acquisitions			
A. Upon merger with Ebasco Corporation (1929)	5,500	$ 227,312.50 3/	2/
B. From Electric Investors, Inc. pursuant to Plan and Agreement of Reorganization (1929)	55,000	1,601,875.00	2/
C. Purchased in the open market (1926-1931)	260,601	12,759,565.33	12,759,565.33
D. Purchased directly from Electric (1931)			
(1) As Stockholder	567,846	8,517,690.00	8,517,690.00
(2) As Underwriter	797,550	11,963,250.00	11,527,071.50
Total	1,686,497	$35,069,692.83	
Disposals			
A. Sales (1930-1931)	8,200	417,275.00	417,275.00
Balance	1,678,297	$34,652,417.83	
Balance held December 31, 1941	1,976,638	$34,747,075.55	

1/ Allocation by Bond and Share.
2/ System cash cost not known.
3/ $763,166.06 in excess of ledger value on books of Electric Investors, Inc.
( ) Indicates Red Figure.

APPENDIX I

ELECTRIC BOND AND SHARE COMPANY

Statement Showing Corporate Net Income, Dividends Declared, and Market Range of Preferred and Common Stocks - Years 1925 to 1941 Inclusive

	1925	1926	1927	1928	1929	1930	1931	1932	1933
Corporate Net Income	$12,302,366	$14,069,234	$11,899,326	$12,098,160	$28,524,409	$42,355,162	$25,050,084	$13,566,665	$10,735,268
Preferred Dividends Declared	1,500,000	1,500,000	2,376,933	3,000,000	4,602,836	7,359,149	8,120,254	8,433,930	8,433,930
Balance	$10,802,366	$12,569,234	$ 9,522,393	$ 9,098,160	$23,921,573	$34,996,013	$16,929,829	$ 5,132,735	$ 2,301,338
Common Dividends Declared									
Cash	$ 2,412,819	$ 2,000,000	$ 3,387,500	$ 4,533,333	$ 1,700,000	-	-	-	-
Stock	-	-	-	-	5,264,331	$ 8,426,043	$ 8,714,486	$ 1,508,286	-
Balance	$ 8,389,546	$10,569,234	$ 6,134,893	$ 4,564,827	$16,957,241	$26,569,969	$ 8,215,342	$ 3,624,449	$ 2,301,338
Market Range of Preferred and Common Stock of Bond and Share -									
$5 Preferred Stock	-	-	-	-	-	88 to 98-3/8	38 to 97	16½ to 59½	22-1/8 to 59-3/4
$6 Preferred Stock	101½ to 107	104-7/8 to 110	105½ to 110-3/4	107 to 111-7/8	100 to 110	100-7/8 to 109-7/8	48 to 108-7/8	19 to 67	25 to 66
Common Stock	-	-	-	-	50 to 189	37-1/8 to 117-7/8	8-3/4 to 61	5 to 48	9-7/8 to 41-5/8

	1934	1935	1936	1937	1938	1939	1940	1941	
Corporate Net Income	$ 9,534,372	$ 9,299,895	$ 9,340,420	$10,642,146	$ 9,401,250	$ 9,709,073	$ 9,979,292	$ 9,571,422	
Preferred Dividends Declared	8,433,930	8,433,930	8,433,930	8,433,930	8,433,930	8,433,930	8,433,930	8,321,330	
Balance	$ 1,100,442	$ 865,965	$ 906,490	$ 2,208,216	$ 967,320	$ 1,275,143	$ 1,545,362	$ 1,250,092	
Common Dividends Declared	-	-	-	-	-	-	-	-	
Balance	$ 1,100,442	$ 865,965	$ 906,490	$ 2,208,216	$ 967,320	$ 1,275,143	$ 1,545,362	$ 1,250,092	
Market Range of Preferred and Common Stock of Bond and Share -									1942 (6 months)
$5 Preferred Stock	28½ to 50½	34 to 69	64-1/4 to 79	47-1/4 to 80	36 to 65	50-5/8 to 65	42 to 66	47⅞ to 65-3/4	38 to 60½
$6 Preferred Stock	31 to 60	37½ to 78½	74-3/4 to 88½	50 to 87½	42 to 70	59 to 72½	51 to 75-1/8	52 to 70	40 to 63-3/4
Common Stock	6 to 23½	3½ to 20-3/8	15-3/4 to 27	5-7/8 to 28-1/8	4½ to 15-7/8	6-3/8 to 12-7/8	3-5/8 to 8-3/4	3/4 to 4-3/8	7/8 to 1-3/8

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Statement Showing Corporate and Consolidated Net Income, Preferred Dividend Requirements, Balance of Net Income After Preferred Dividend Requirements, Dividends Declared, Preferred Dividend Arrearages and Market Range of Preferred and Common Stocks.
For the Years [illegible] to [illegible] Inclusive.

	1925	1926	1927	1928	1929	1930	1931	1932	1933	1934	1935	1936	1937	1938
Corporate Net Income	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	$12,739,130	$3,306,703	$ 6,725,130	$ 3,424,331	$ 3,277,973	$ 5,208,003	$ 6,756,311	$ 7,667,477	$ 6,086,250
Preferred Dividend Requirements	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Balance of Corporate Net Income	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Consolidated Net Income	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	$17,448,730	$14,806,707	$ 8,483,282	$ 3,804,003	$ 3,950,920	$ 7,512,476	[illegible]	$11,448,078	$ 9,409,106
Preferred Dividend Requirements	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Balance of Consolidated Net Income	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Dividends Declared														
Preferred Stock	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Common Stock - In Cash	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
- In Common Stock	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Preferred Dividend Arrearages at December 31	—	—	—	—	—	—	—	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Market Range of Preferred and Common Stock of America														
Preferred Stock ($5)	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
$3 Preferred Stock	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Common Stock	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

( ) Indicates red figures.

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[redacted]

[redacted]	[redacted]	[redacted]	[redacted]
$ [redacted]	$ [redacted]	$ [redacted]	$ [redacted]
[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]
$ [redacted]	$ [redacted]	$ [redacted]	$ [redacted]
[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]
$ [redacted]	$ [redacted]	$ [redacted]	$ [redacted]
[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]

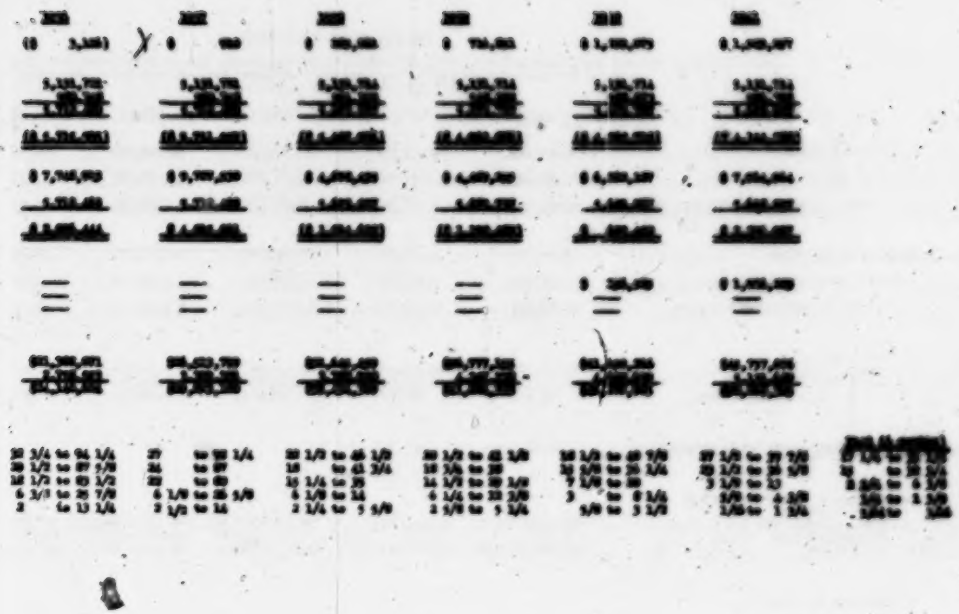
ELECTRIC POWER & LIGHT CORPORATION

Statement Showing Corporate and Consolidated Net Income, Preferred Dividend Requirements, Balance of Net Income After Preferred Dividend Requirements, Dividends Declared, Preferred Dividend Arrearages, and Market Range of Preferred and Common Stocks and Option Warrants For the Years 1925 to 1941 Inclusive

	1925	1926	1927	1928	1929	1930	1931	1932	1933	1934	1935	1936	1937
Corporate Net Income	$3,996,684	$4,405,462	$5,005,480	$5,430,923	$6,079,348	$ 7,239,973	$8,777,195	$4,167,288	($ 110,039)	($ 399,386)	($ 395,797)	($ 3,135)	$ 950
Preferred Dividend Requirements 1/													
First Preferred Stock	1,676,881	2,923,025	3,242,318	3,402,271	3,528,567	4,119,773	5,114,981	5,131,737	5,131,794	5,131,798	5,131,798	5,131,798	5,131,798
Second Preferred Stock	608,226	776,988	774,837	775,161	780,980	784,609	784,609	780,609	697,484	538,268	538,268	538,268	538,268
Total	2,285,107	3,700,013	4,017,155	4,177,432	4,309,547	4,904,382	5,899,590	5,912,346	5,829,278	5,670,066	5,670,066	5,670,066	5,670,066
Balance of Corporate Net Income	$ 711,577	$ 705,449	$1,088,325	$1,253,491	$1,769,801	$ 2,335,591	$2,877,605	($5,744,634)	($5,939,317)	($6,069,452)	($6,065,863)	($5,673,201)	($5,669,116)
Consolidated Net Income	$3,921,020	$4,275,680	$7,728,653	$8,382,522	$9,708,274	$10,247,648	$9,980,097	$4,757,388	($3,139,251)	$ 156,746	$ 539,526	$ 7,748,953	$ 9,727,529
Preferred Dividend Requirements 1/	2,285,107	3,700,013	4,017,155	4,177,432	4,309,547	4,904,382	5,899,590	5,912,346	5,829,278	5,670,066	5,670,066	5,670,066	5,670,066
Balance of Consolidated Net Income	$1,635,913	$2,575,669	$3,711,498	$4,205,128	$5,398,727	$ 5,343,266	$4,080,507	($11,657,734)	($8,967,529)	($5,513,320)	($5,130,540)	$ 2,078,887	$ 4,057,463
Dividends Declared													
First Preferred Stock	$1,676,881	$2,923,025	$3,242,318	$3,402,271	$3,528,567	$ 4,119,773	$5,114,981	$4,373,978	—	—	—	—	—
Second Preferred Stock	608,226	776,988	774,837	775,161	780,980	784,609	784,609	780,609	—	—	—	—	—
Common Stock	—	—	—	1,760,883	1,788,859	1,887,277	1,887,277	889,177	—	—	—	—	—
Preferred Dividend Arrearages at December 31													
First Preferred Stock	—	—	—	—	—	—	—	$ 857,271	$5,988,996	$11,118,978	$16,250,616	$21,382,414	$26,513,799
Second Preferred Stock	—	—	—	—	—	—	—	156,724	1,019,341	1,482,341	1,777,813	2,316,081	2,778,977
Total	—	—	—	—	—	—	—	$1,013,995	$7,008,337	$12,601,319	$18,028,429	$23,698,495	$29,292,776
Market Range of Preferred and Common Stocks and Option Warrants of Electric													
$7 Preferred Stock	99 7/8 to 94 7/8	89 1/2 to 90 1/4	96 to 109	105 to 110 1/8	96 to 109 1/4	99 to 113	61 to 108 1/8	30 3/4 to 64	7 1/2 to 36 1/2	6 5/8 to 21	3 to 14 3/8	32 3/4 to 84 1/4	37 to 92 1/4
$6 Preferred Stock	—	—	—	—	—	84 3/4 to 102	32 to 98 1/2	8 7/8 to 53 1/2	6 1/2 to 33 3/4	6 to 19 3/4	2 1/2 to 14 3/8	28 1/2 to 87 1/8	34 to 87
$7 Second Preferred Stock	—	85 1/2 to 91 1/4	89 1/2 to 104 1/2	99 3/4 to 108	94 1/2 to 109	88 to 107	45 to 101	6 1/2 to 43	4 1/8 to 20	3 3/4 to 22 1/8	2 3/4 to 20	18 1/2 to 80 1/2	22 to 80
Common Stock	17 3/8 to 40 1/8	35 1/4 to 34 1/2	26 1/2 to 38 3/8	28 3/4 to 49 3/8	28 1/8 to 85 5/8	34 3/8 to 103 1/2	9 to 50 3/4	2 3/4 to 16	3 1/8 to 16 3/8	2 1/4 to 9 5/8	1 1/8 to 7 1/2	6 3/8 to 26 7/8	6 1/8 to 26 5/8
Option Warrants	—	3 1/2 to 8	6 5/8 to 15	13 1/8 to 30 7/8	10 1/8 to 61 3/4	15 1/2 to 78 1/8	3 1/2 to 37 7/8	1 1/8 to 7 7/8	1 1/2 to 9 1/2	1 to 4 3/4	1/2 to 3 1/2	2 to 13 1/4	2 1/2 to 14

1/ Preferred dividend requirements for years 1925 to 1941, inclusive, are based on number of shares of preferred stock outstanding at end of year.

( ) Indicates red figure.



[Document No. 93.]

Securities and Exchange Commission
Philadelphia

In the Matter of
Electric Bond and Share Company,
American Power & Light Company,
Pacific Power & Light Company,
Electric Power & Light Corporation,
Utah Power & Light Company,
National Power & Light Company,
Ebasco Services Incorporated,
Respondents.

File No. 59-12

PETITION FOR RE-HEARING ON BEHALF OF ELECTRIC POWER & LIGHT CORPORATION.

[Received for Filing, August 27, 1942.]

Electric Power & Light Corporation ("Electric"), one of the respondents in the above proceedings, respectfully moves the Securities and Exchange Commission ("Commission"), in accordance with Paragraph (d) of Rule XII of the Rules of Practice of said Commission, for a re-hearing of the matters decided in its opinion and findings made herein on, to wit, the twenty-second day of August, 1942, upon which its order of dissolution of Electric, made and entered on said date, is based, and to vacate and set aside said order of dissolution on the following grounds:

1. The Commission erred in overruling and denying Electric's motion to dismiss the Commission's notice of and order for hearing and the proceedings thereunder made at the conclusion of the Commission's case and renewed at the conclusion of the hearing, for each and every reason stated in said motion.

2. The Commission erred in denying the motion of respondent Electric to consolidate the application by Electric for approval of a certain Section 11(e) Plan filed by it on December 4, 1941, which said motion for consolidation was filed with the Commission on December 6, 1941.

3. The Commission erred in its finding and conclusion that the corporate structure and continued existence of Electric unduly and unnecessarily complicates the structure of Electric Bond and Share Company holding company system, and unfairly and inequitably distributes voting power among the security holders of such system.

4. The Commission erred in its finding and conclusion that to effect the requirements of Section 11(b)(2) of the Public Utility Holding Company Act of 1935 it is necessary that Electric be dissolved.

5. The Commission erred in holding that the Plan filed by Electric under Section 11(e) of said Act is defective and not entitled to consideration prior to the entry of an order of dissolution.

The matters herein stated as grounds for re-hearing, and respondents' contentions with respect thereto, have been fully stated in the record and are dealt with by the Commission in its said findings and opinion.

Respectfully submitted,

SIMPSON THACHER & BARTLETT,
by JOHN F. MACLANE,

REID & PRIEST,
by FRANK A. REID,

WRIGHT, GORDON, ZACHEY, PARLIN & CAHILL,
by BOYKIN C. WRIGHT,
Counsel for ELECTRIC POWER & LIGHT CORPORATION.

August 27, 1942.

[Document No. 94]

Securities and Exchange Commission
Philadelphia.

In the Matter of
Electric Bond and Share Company,
American Power & Light Company,
Pacific Power & Light Company,
Electric Power & Light Corporation,
Utah Power & Light Company,
National Power & Light Company,
Ebasco Services Incorporated,
Respondents.

File No. 59-12

PETITION FOR RE-HEARING ON BEHALF OF AMERICAN POWER & LIGHT COMPANY.

[Received for Filing August 27, 1942].

American Power & Light Company ("American"), one of the respondents in the above proceedings, respectfully moves the Securities and Exchange Commission ("Commission"), in accordance with Paragraph (d) of Rule XII of the Rules of Practice of said Commission, for a rehearing of the matters decided in its opinion and findings made herein on, to wit, the twenty-second day of August, 1942, upon which its order of dissolution of American, made and entered on said date, is based, and to vacate and set aside said order of dissolution on the following grounds:

1. The Commission erred in overruling and denying American's motion to dismiss the Commission's notice of and order for hearing and the proceedings thereunder made at the conclusion of the Commission's case and renewed at the conclusion of the hearing, for each and every reason stated in said motion.

2. The Commission erred in sustaining the ruling of the Trial Examiner excluding testimony offered by American, and in rejecting offers of proof in support thereof, with respect to the valuation of assets of respondent American, both as bearing on the issues in the pending proceeding and as bearing on the plan of reorganization filed by American.

3. The Commission erred in denying the motion of respondent American to consolidate the application by American for approval of a certain Section 11(e) Plan filed by it on July 23, 1941, which said motion for consolidation was filed with the Commission on December 6, 1941.

4. The Commission erred in its finding and conclusion that the corporate structure and continued existence of American unduly and unnecessarily complicates the structure of Electric Bond and Share Company holding company system, and unfairly and inequitably distributes voting power among the security holders of such system.

5. The Commission erred in its finding and conclusion that to effect the requirements of Section 11(b)(2) of the Public Utility Holding Company Act of 1935 it is necessary that American be dissolved.

6. The Commission erred in holding that the Plan filed by American under Section 11(e) of said Act is defective and not entitled to consideration prior to the entry of an order of dissolution.

The matters herein stated as grounds for rehearing, and respondent's contentions with respect thereto, have been fully stated in the record and are dealt with by the Commission in its said findings and opinion.

Respectfully submitted,

SIMPSON THACHER & BARTLETT,

by JOHN F. MACLANE,

REID & PRIEST,
by FRANK A. REID,
Counsel for AMERICAN POWER & LIGHT COMPANY.

August 27, 1942.

[DOCUMENT No. 95.]

UNITED STATES OF AMERICA

Before the Securities and Exchange Commission

At a regular session of the Securities and Exchange Commission, held at its office in the City of Philadelphia, Pennsylvania on the 28th day of August, A. D., 1942.

Reg. No. Docket Unit 509090, 509091.
Reg No. Docket Unit 509186-509190 incl.

In the Matter of
Electric Bond and Share Company,
American Power & Light Company,
Pacific Power & Light Company,
Electric Power & Light Corporation,
Utah Power & Light Company,
National Power & Light Company,
Ebasco Services Incorporated,
Respondents.

File No. 59-12

Public Utility Holding Company Act of 1935—Section 11(b) (2).

ORDER DENYING PETITION OF AMERICAN POWER & LIGHT COMPANY TO VACATE AND SET ASIDE THE COMMISSION'S ORDER DATED AUGUST 22, 1942 AND FOR REHEARING.

August 28, 1942.

The Commission having on August 22, 1942 made and filed its findings and opinion in the within proceeding and

having on August 22, 1942 issued its order requiring the dissolution of American Power & Light Company and denying motions made by American Power & Light Company to dismiss the notice of and order for hearing in the within proceeding and to dismiss the proceeding itself, and to consolidate with the within proceeding a certain "application for approval of Plan under Section 11(e) of the Public Utility Holding Company Act of 1935," and certain other motions;

American Power & Light Company having filed on August 27, 1942 a petition for rehearing with respect to certain findings of the Commission set forth in the aforementioned findings and opinion, and with respect to the rulings thereon contained in the aforementioned order of the Commission dated August 22, 1942, and having petitioned to vacate and set aside such order;

Said petition reciting that "the grounds for rehearing, and respondents' contentions with respect thereto have been fully stated in the record and are dealt with by the Commission in its said findings and opinion";

It is ordered that the petition of American Power & Light Company dated August 27, 1942 to vacate and set aside the Commission's order dated August 22, 1942, and for a rehearing with respect to the findings and rulings of the Commission, be, and the same hereby is, denied.

By the Commission.

[SEAL] ORVAL L. DuBOIS, *Secretary.*

[Document No. 96]

UNITED STATES OF AMERICA

Before the Securities and Exchange Commission

At a regular session of the Securities and Exchange Commission, held at its office in the City of Philadelphia, Pennsylvania, on the 28th day of August, A. D., 1942.

In the Matter of

Electric Bond and Share Company,
American Power & Light Company,
Pacific Power & Light Company,
Electric Power & Light Corporation,
Utah Power & Light Company,
National Power & Light Company,
Ebasco Services Incorporated,
Respondents.

File No. 59-12

Public Utility Holding Company Act of 1935—Section 11(b) (2).

ORDER DENYING PETITION OF ELECTRIC POWER & LIGHT CORPORATION TO VACATE AND SET ASIDE THE COMMISSION'S ORDER DATED AUGUST 22, 1942, AND FOR REHEARING.

August 28, 1942.

The Commission having on August 22, 1942 made and filed its findings and opinion in the within proceeding and having on August 22, 1942 issued its order requiring the dissolution of Electric Power & Light Corporation and denying motions made by Electric Power & Light Corporation to dismiss the notice of and order for hearing in the within proceeding and to dismiss the proceeding itself, and to consolidate with the within proceeding a certain

"application for approval of Plan under Section 11(e) of the Public Utility Holding Company Act of 1935," and certain other motions;

Electric Power & Light Corporation having filed on August 27, 1942 a petition for rehearing with respect to certain findings of the Commission set forth in the aforementioned findings and opinion, and with respect to the rulings thereon contained in the aforementioned order of the Commission dated August 22, 1942, and having petitioned to vacate and set aside such order;

Said petition reciting that "the grounds for rehearing, and respondents' contentions with respect thereto have been fully stated in the record and are dealt with by the Commission in its said findings and opinion";

It is ordered that the petition of Electric Power & Light Corporation dated August 27, 1942 to vacate and set aside the Commission's order dated August 22, 1942, and for a rehearing with respect to the findings and rulings of the Commission, be, and the same hereby is, denied.

By the Commission.

[SEAL] ORVAL L. DuBOIS, *Secretary.*

CLERK'S COPY.

Vol. III

TRANSCRIPT OF RECORD

(Pages 681 to 886)

Supreme Court of the United States

OCTOBER TERM, 1945

No. 6

AMERICAN POWER & LIGHT COMPANY,
PETITIONER,

vs.

SECURITIES AND EXCHANGE COMMISSION

No. 7

ELECTRIC POWER & LIGHT CORPORATION,
PETITIONER,

vs.

SECURITIES AND EXCHANGE COMMISSION

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONS FOR CERTIORARI FILED JUNE 13, 1944.

CERTIORARI GRANTED MAY 28, 1945.

United States Circuit Court of Appeals

FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1942.

No. 3823.

AMERICAN POWER & LIGHT COMPANY,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

No. 3824.

ELECTRIC POWER & LIGHT CORPORATION *v.* SAME.

Supplemental Portions of
TRANSCRIPT OF RECORD

Pages 681 to 866, inclusive.

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Letter dated January 13, 1928, from Frank Silliman, Jr., Vice-President of Electric Bond and Share Company, to Guy W. Talbot, President of Northwestern Electric Company. Commission's Exhibit 174	861
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SUPPLEMENTAL PORTIONS OF TRANSCRIPT OF RECORD

COMMISSION'S EXHIBIT 135

A meeting of the Executive Committee of the ELECTRIC BOND AND SHARE COMPANY was held on Thursday, the 5th day of August, 1909, at 30 Church Street, New York City, at 3:45 P. M.

Present: Messrs. C. A. Coffin
Marsden J. Perry
A. M. Young
S. Z. Mitchell

The minutes of the previous meeting were read and approved.

The matter of purchasing the Wichita Gas & Electric properties and forming a holding company to take over said properties, and also the Pittsburg, Kansas, and Astoria, Oregon, properties, was discussed at some length.

Mr. Mitchell stated: That the Electric Bond and Share Company had already spent for the acquisition of the Pittsburgh property about $400,000, and approximately $66,000.00 for the western holdings of the Astoria Electric Company stock, and that it will be necessary to advance additional money for improvements to the Astoria and Pittsburg properties. The contract for the purchase of the Wichita properties will call for the payment of approximately $1,100,000 in cash on September 1, 1909, and if the properties are purchased it will be necessary shortly thereafter to spend approximately $200,000 for improvements thereof. Mr. Mitchell stated that William P. Bonbright & Company had signified their willingness to join in a Syndicate with this Company for the purpose of raising $2,500,000 to be used for financing the purchase of the Astoria, Wichita and Pittsburg properties.

On motion, duly seconded, it was voted as follows:

In order to minimize the risks and commitments of this Company in connection with the above, the officers were authorized as follows:

1. To form a syndicate to provide $2,500,000 in cash to be used:

(a) in the acquisition from the Electric Bond and Share Company of (1) the stock of the Astoria Electric Company at par, (2) the stocks and other securities of the Wichita and Pittsburg properties at cost, and (3) to reimburse the Electric Bond and Share Company for expenses incurred by it for and in connection with the acquisition and management of the aforesaid properties in behalf of a new corporation hereinafter referred to, together with interest on all disbursements made by the Electric Bond and Share Company for and in connection with the transaction as a whole including any expenses or liabilities incurred by the Electric Bond and Share Company as manager of the syndicate; and

(b) for organizing the new corporation hereinafter referred to, the issuance of its securities and providing said company with working capital.

2. To sell to William P. Bonbright & Company participation in said syndicate to the extent of not exceeding a two-fifths interest therein, with the understanding, however, that Bonbright & Company shall give to employees of this Company and to such other persons or banks as the officers of this Company deem it desirable to interest in the project a reasonable proportion of their two-fifths allotment in the syndicate. The Electric Bond and Share Company will itself participate in said syndicate for the remaining three-fifths interest upon the same basis as the other participators in said syndicate, except that all the members of the syndicate other than Electric Bond and Share Company are to pay to it in cash five percent. of their respective participations in the syndicate, said five per cent. payment to be made as an arbitrary allowance to Electric Bond and Share Company for its general expenses, risk and profit. Electric Bond and Share Company shall be the sole manager of the syndicate, but shall make no charge for services as such manager.

3. As manager of the syndicate, to form a holding company under the name of American Power & Light Company, or such other name as may be determined upon, under the laws of such state as counsel may advise, with an authorized capital consisting of $10,000,000 common stock and $5,000,000 preferred stock, which Company will issue $2,500,000 of preferred stock and $5,500,000 of common stock for the securities of the Astoria, Pittsburg and Wichita Companies and for working capital.

4. As manager of the syndicate aforesaid to sell the preferred and common stock of the proposed holding company in blocks of such amounts of preferred and common stock as they may deem necessary or expedient, provided such blocks produce in the aggregate not less than $2,500,000 cash, and further to pay such commissions in stock or cash, or both, for account of the syndicate as they may deem expedient, and also to purchase at not exceeding $15.00 per share for account of this Company all or any part of the common stock commissions which may be paid to dealers or others for placing the blocks of the holding company preferred and common stock.

Upon motion, duly seconded, it was

RESOLVED that the officers of this Company be and they hereby are authorized to purchase the Wichita Gas & Electric properties upon the basis of the option dated July 14, 1909, signed by Messrs. Randle, Davidson and Wilbur.

* * * * * * *

(Signed) H. M. FRANCIS, *Secretary.*

March 3, 1941

L. B. WIEGERS, Secretary and Treasurer of Electric Bond and Share Company.

CROSS-EXAMINATION

[7707] Q. I should like to discuss with you this morning Electric Bond and Share Company's activity in connection with the American Power & Light Company. Will you kindly tell us the earliest date at which you find from the record at your disposal that Electric Bond and Share Company took any action in connection with American Power & Light Company or with any of the properties which thereafter went into American Power & Light Company?

A. The first property which subsequently went into the American Power & Light Company and in which Electric Bond and [7708] Share Company had an interest was the Astoria Electric Company, of which a block of 967 shares were acquired in January, 1906.

Q. How many shares did you say that was?

A. My recollection is that it was 967 shares.

Q. Those were common shares?

A. They were.

Q. And were they received by Electric Bond and Share Company at the time of its organization from General Electric Company?

A. No; they were received in exchange for other securities which were acquired at the formation of Electric Bond and Share Company in 1905.

Q. With whom did they make this exchange? From whom had they acquired these shares of Astoria Electric Company?

A. In 1905 among the securities acquired by Electric Bond and Share Company from General Electric Company were 3100 shares of the Ateliers Thomson Houston Company which were in January, 1906, surrendered to the General Electric Company in exchange for other securities and

some cash, among which were the 967 shares of Astoria Electric Company.

Q. Were the securities of any of the Kansas properties that were subsequently conveyed to American Power & Light Company included in the original group received from General Electric Company,—or as the result of any exchanges with [7709] General Electric Company?

A. Not to my recollection.

Q. The original group of Astoria Electric Company shares was subsequently increased, was it not, by purchases on the part of the Electric Bond and Share Company?

A. Subsequently increased?

Q. Yes.

A. Yes.

Q. At the formation of American Power & Light Company in 1909, Electric Bond and Share Company owned 3,000 shares of Astoria Electric Company; isn't that so?

A. That is correct.

Q. Now, will you tell us how it acquired the additional shares and what the cost of the entire block was to Electric Bond and Share Company?

A. All of the additional shares of Astoria Electric Company were acquired for cash. There were 2033 additional shares acquired upon the cash expenditure of $172,385.

Q. What were the original 967 shares entered on the books of Electric Bond and Share Company at?

A. $58,020.

Q. Is it correct to say then that the total cost to Electric Bond and Share Company of the 3,000 shares of Astoria Electric Company which were conveyed to American Power & Light [7710] Company in 1909 had a total cost to Electric Bond and Share Company of $230,405?

A. That was the cost to Electric Bond and Share.

Q. Had Electric Bond and Share Company received any income from the Astoria Company during the period that it held these shares, in the form of dividends, interest, service fees, or otherwise?

A. I just do not recall whether or not there were any dividends, interest or service fees collected.

Q. When do you find that Electric Bond and Share Company made its first acquisition of properties in Kansas?

A. The record indicates that the first payment made in connection with acquisition of Kansas properties was on April 29, 1909.

Q. And what was acquired at that time?

A. Stocks and bonds of the Home Light, Heat & Power Company.

Q. Did it at that time acquire 4,000 shares of capital stock, $200,000 principal amount of 6 percent bonds and a $38,000 note receivable of the Home Light, Heat & Power Company of Kansas?

A. I don't think at that time they received $38,000 in notes receivable of Kansas. I think at that time they just acquired the $200,000 principal amount of notes, and 4,000 shares [7711] of common stock.

Q. And what did it pay for that initial investment?

A. The initial payment was $390,000. However, there were additional costs applicable to the securities acquired.

Q. What costs were those?

A. Legal expenses and expenses in securing options, so that I have here a total of the costs transferred to the syndicate of $412,520.68.

Q. And what amount had Electric Bond and Share Company entered these properties in its Investment Account? At $412,520 or $390,000?

A. The payment in connection with the actual purchase of the securities was $390,000, but there was added to that $390,000 on the books of Bond and Share these other costs.

Q. Then did the properties stand on the books of Bond and Share at $412,520 or was $22,520 subsequently added as a fair allocation of expenses when the properties were sold?

A. No. The original entry of April 29th was the $390,000, and these other items were added to the cost of the se-

curities of the Home Light, Heat & Power Company during May, June, August and November of 1909.

Q. You say these additional items comprised of legal expenses and what else?

A. Expenses for securing options.

[7712] Q. Options on what?

A. The options to purchase the securities of the Home Light, Heat & Power Company.

Q. How much did those expenses amount to?

A. $1,992.50.

Q. Can you give us an itemization of that $22,520 which was added subsequent to the purchase of these properties?

A. The record shows a payment to C. M. Maxwell on account of agreement with M. C. Kelly dated January 19, 1909, $2,330.40; payment to J. D. Mortimer, transfer of draft by S. Z. Mitchell, $5,000; in June, payment to McCune, Harding, Brown and Murphy of $3,149.40.

As I have stated before, the expenses for securing the options to purchase the securities, $1,992.50. And further payment to M. C. Kelly on account of the agreement with C. M. Maxwell, $3,145.15; payment in August to Maxwell and Power for $5,000; payment in November to M. C. Kelly of $1,903.23.

Those items, together with the $390,000, make up the $412,520.68.

Q. Did you mention an item there as having been paid to S. Z. Mitchell?

A. No. The payment was to J. D. Mortimer. It says here "transfer charges of draft by S. Z. Mitchell."

Q. Is there any indication as to when the $38,000 note of [7713] the Home Light, Heat & Power Company was acquired?

A. I do not have the ready reference on that, Mr. Berman. It may be assumed that the $38,000 note was acquired in connection with the entire transaction, and that no additional payment was made for the acquisition of the $38,000 note, subject to verification from the record.

Q. Similarly, I take it we will assume that the note is included in the total cost of $412,520.68?

A. Subsequent to verification, yes.

Q. Were there any other expenses incurred in connection with those properties and charged to them on the books of Electric Bond and Share Company prior to their transfer?

A. Well, there were certain investigation accounts investigating properties that were subsequently added to the cost of things that were sold by Electric Bond and Share Company to the American Power & Light syndicate.

Q. What sort of investigations were those? Were they investigations made prior to the purchase of the properties, or were they investigations made subsequent to the purchase of the properties, or were they investigations that were not actually made but merely charged as such?

A. I cannot give you from what record I have here the specific dates during which these investigations were conducted, but there were accounting and engineering investigations made in [7714] connection with the purchase of the properties.

Q. And how much was charged to these properties for such investigations?

A. Again I cannot pick the details out of the information that I have here as to the amount applicable to the specific property.

Q. Subsequent to April 29, 1909, when was the next acquisition of properties in Kansas made by Electric Bond and Share Company?

A. On August 28, 1909, payment was made to C. H. Randle, J. O. Davidson and J. B. Wilbur in accordance with the agreement dated May 29, 1909, and the amount of the payment was $750,000. There was, however, additional payment in accordance with this same contract on September 1st of $293,500.

Q. September 1st, 1909?

A. Yes, sir.

Q. Of how much and for what properties?

A. $293,500. These payments were made in connec-

tion with the purchase of the Wichita properties which were The Edison Light & Power Company, the United States Gas Company and the United Gas Appliance Company. They were additional charges in the Purchase Account during September of $25,000 which represented the net amount of advances made to the United Gas Company, and a payment to H. P. Wright for services in accordance with the letter agreement [7715] dated May 29, 1909.

Q. In what amount?

A. In the amount of $15,000. So that the aggregate charges in the Wichita Purchase Account were $1,061,000.

Q. Is that the H. P. Wright who subsequently became a director of American Power & Light Company?

A. It may be assumed that it was, subject to correction.

Q. Can you tell us what purpose this payment was made to Mr. Wright for?

A. The record indicates that it was a payment for services in accordance with the letter agreement of May 29, 1909.

Q. Did you say that a contract for the purchase of the Wichita properties pursuant to which the payment of August 28 and September 1 were made, that that contract was entered into on May 29, 1909?

A. That is correct.

Q. And do you have a copy of that contract between the Electric Bond and Share Company and the vendors of this property?

A. I have, yes.

Q. Can you furnish us with a copy?

A. Yes.

Q. Will you likewise furnish us with a copy of the letter of May 29, 1909 from or to H. P. Wright to which you referred a few minutes ago?

[7716] A. I will endeavor to get a copy of that for you, yes.

Q. Prior to the payment of $750,000 by Electric Bond and Share Company which was made on August 28, 1909, did Electric Bond and Share Company take some action with

respect to the formation of American Power & Light Company?

A. Yes, I believe so. I believe that such action was taken in the early part of August, 1909.

Q. And as part of the plan which was put into operation, did Electric Bond and Share Company enter into a syndicate agreement with William Bonbright and Company?

A. The minutes of the Board of Directors of Electric Bond and Share Company or of the Executive Committee of Bond and Share Company indicate that there was an agreement between Bond and Share Company and Bonbright and Company for the formation of this syndicate.

Q. Do you have a copy of the syndicate agreement which was entered into between Bonbright and Electric Bond and Share Company?

A. No, I do not.

Q. Is there a copy of this agreement to be found in the files of Electric Bond and Share Company or anyone else?

A. I have never found a copy of that agreement.

Q. You have looked for it?

A. Yes, I have.

[7717] Q. Have you inquired of Bonbright and Company whether a copy of that agreement is to be found in their files?

A. No, I have not.

Q. Would you be good enough to make inquiry of Bonbright and Company as to whether they are able to locate a copy of this syndicate agreement in their files, Mr. Wiegers, and advise us if such a copy can be obtained?

A. If I can do that, I will be glad to, Mr. Berman. However, I am inclined to think that the search for any such documents perhaps ends in the records that are under my control.

Q. I thought you might be interested to obtain a copy of this document for your own records. If you have any hesitancy about the matter, we will be glad to make inquiry of Bonbright and Company ourselves, if you prefer it that way.

A. I will endeavor to make inquiry of Bonbright and Company.

Q. Electric Bond and Share Company was the syndicate manager, was it not?

A. Yes, it was.

Q. Do you have at this time a transcript of the syndicate account?

A. Yes, I do.

Q. May I see it?

A. (Handing paper to counsel.)

[7718] Q. It is a fact, is it not, that this syndicate acquired from Electric Bond and Share Company, its holdings of securities in the Astoria Electric Company, in the Home Light, Heat & Power Company of Kansas, and of the securities acquired by Bond and Share pursuant to a contract in the Wichita properties?

A. That is correct.

Q. What was the total amount paid by the syndicate to Electric Bond and Share Company for the acquisition of these securities?

A. Off the record.

(Discussion off the record.)

MR. BERMAN: Permit me to introduce as Commission's Exhibit 142 this transcript of the syndicate account handed to me by Mr. Wiegers.

MR. MACLANE: No objection.

THE EXAMINER: Admitted.

(Commission's Exhibit 142 received in evidence.)

By MR. BERMAN:

Q. Do I understand you to say, Mr. Wiegers, that the amount received by Electric Bond and Share Company from the syndicate would be the total of the items listed at the head of the right-hand column on the first page of Commission's Exhibit 142?

A. No, because Bond and Share in addition to these property [7719] accounts were reimbursed for these investigation accounts which are shown later on.

Q. You mean it received the amounts shown at the head of this column, and then it received certain additional amounts as well?

A. It received reimbursements for investigation accounts and others afterwards from the syndicate.

Q. Are the investigation accounts listed anywhere on this transcript?

A. Yes, they are all on this transcript.

Q. Will you give me the total of the sums paid by the syndicate into Electric Bond and Share Company?

A. The total payments to the syndicate account aggregated $2,500,000.

Q. Of that $2,500,000, what part was paid to Electric Bond and Share Company by the syndicate?

A. I don't know that your question is clear to me.

Q. To whom did the syndicate pay the $2,500,000?

A. The $2,500,000 was received by Electric Bond and Share Company.

Q. And did Electric Bond and Share Company actually receive from the syndicate members $2,500,000 in cash, or was this amount to which the syndicate members were committed, in an adjustment which was made on the books of the syndicate in closing out the [7720] account?

A. This is the amount to which the syndicate participants were committed to the syndicate.

Q. Was this amount actually received in cash from the syndicate participants by Electric Bond and Share Company?

A. It was received in cash from the subscribers to the preferred stock of American Power & Light Company.

Q. In other words, these sums were realized by Electric Bond and Share Company subsequent to the formation of American Power & Light Company when the preferred stock was issued, the purchase price paid by the purchasers of that preferred stock, is that correct?

A. That is correct.

Q. So that, is it true, the syndicate participants did not actually, at the date of the syndicate formation or shortly thereafter, pay over to Electric Bond and Share Company $2,500,000?

A. Well, the syndicate participants did actually pay over to Electric Bond and Share Company $1,000,000.

Q. Did they actually pay that sum over to Electric Bond and Share Company in cash?

A. Yes, sir.

Q. And when do the books and records of Electric Bond and Share Company show that they received $1,000,000 in cash from the syndicate participants?

[7721] A. During August, September, October and November 1909.

Q. Do you have an itemization of those receipts?

A. I just have a penciled notation here of the amounts that were received by months.

Q. And from whom received?

A. No, I do not have the details here from whom received.

Q. Can you obtain for us the details of the receipt of that $1,000,000, from whom received, and in what way?

A. Yes, I can.

Q. How did Electric Bond and Share Company treat the $2,500,000 received from the syndicate on its books?

A. As a credit against the charges made in the syndicate account, the charges aggregating $2,500,000, and it was credited with the same amount.

Q. The contract between the Electric Bond and Share Company and the syndicate provided that Electric Bond and Share Company was to turn over the various properties concerned at Electric Bond and Share Company's costs, plus disbursements and interest thereon, with the exception of the Astoria Electric Company securities which were to be turned over at the flat amount of $300,000; isn't that so?

A. I think generally that is so. However, the $300,000 was part of the $2,500,000 and not in addition.

Q. Yes, I so understand. Now, at the formation of American [7722] Power & Light Company, in addition to conveying these various securities, how much did Electric Bond and Share Company transfer as cash?

A. At the formation of American Power & Light Company, it was $500,000.

Q. And at that time that represented the entire amount of cash transferred, is that right?

A. At that time, yes, that is correct.

Q. So that of the $2,500,000 received by Electric Bond and Share Company, $2,000,000 was applicable to the various securities transferred by Electric Bond and Share Company; is that not so?

A. Not exactly, because subsequently there were other amounts of cash that were paid over to American Power & Light Company.

Q. What items are you referring to now?

A. Under date of April 4, 1911, $50,000; on April 27, 1912, $30,223.66.

Q. These did not occur until 1911 or 1912. What did they represent, Mr. Wiegers?

A. The record says that these disbursements, both of them, were distribution on account of requirements of American Power & Light Company in accordance with the understanding between Electric Bond and Share Company and American Power & Light Company, also per authority of the Executive Committee.

[7723] Q. That would be the Executive Committee of Electric Bond and Share Company?

A. Yes.

Q. And what do you find in the minutes of the Executive Committee relating to this item?

A. I am sorry, I did not look it up specifically.

Q. Will you find for us the minute of the meetings of the Executive Committee, and whatever minutes of the Board of Directors relate to these payments, and produce copies of such minutes for us?

A. I will endeavor to do so, yes.

Q. Then the total cash transferred by Electric Bond and Share Company in connection with the organization of American Power & Light Company including the two items subsequently transferred in 1911 and 1912 aggregated $580,223.66, is that correct, Mr. Wiegers?

A. That is correct.

Q. If that be subtracted from the $2,500,000 received by Electric Bond and Share Company, what does that leave?

A. $1,919,776.34.

Q. And what was the total amount of expenses and disbursements claimed by Electric Bond and Share Company to have been incurred in connection with the various properties transferred to the syndicate?

[7724] A. I do not have the specific tabulation for that. I can add them all up.

Q. All such items are enumerated in this tabulation, are they not?

A. All the charges against the syndicate are enumerated in this exhibit, yes.

Q. And the disbursements and the expenses are part of the charges against the syndicate, are they not?

A. That is correct.

Q. Will you kindly total for us the items which represent disbursements and expenses charged to the syndicate?

A. $146,255.66.

Q. Those items were supposed to have represented actual disbursements and expenses incurred by Electric Bond and Share Company, with interest thereon; is that correct?

A. And charged to the syndicate.

Q. Included in that sum is no element of profit to Electric Bond and Share Company other than the interest received, is that so?

A. I believe that is so.

Q. If we deduct that $146,255.66 from the $1,919,776.34 balance, at what sum do we arrive?

A. $1,773,520.68.

Q. If we aggregate the costs which you stated Electric Bond [7725] and Share Company had incurred in the acquisition of Astoria, Home Light, Heat & Power Company and Wichita properties, what sum do we find they total?

A. $1,703,925.68.

Q. What are the component parts of that figure, Mr. Wiegers?

A. The Astoria Electric Company, $230,405; the Home Light, Heat & Power Company, $412,520.68; the Wichita properties, $1,061,000.

Q. If that sum be deducted in turn from our last previous balance, what do we find to remain?

A. $69,595.

Q. Did that sum of $69,595 represent net profit to Electric Bond and Share Company on the securities conveyed to the syndicate?

A. It represents the difference between the cost to Bond and Share on the 3,000 shares of Astoria Electric Company and the amount which was charged by Bond and Share to the syndicate.

Q. You have included in your aggregate total cost to Electric Bond and Share Company, have you not, Mr. Wiegers, certain amounts for expenses or investigations in connection with the Home Light, Heat & Power Company and the United Gas Company and other Wichita properties?

[7726] A. That is correct.

Q. On the other hand, we have already allowed, have we not, for a total of $146,255.66 for disbursements and expenses? Are there any duplications in these figures?

A. No, sir.

Q. That is to say, the $146,255.66 were disbursements and expenses in addition to the investigations made in connection with these properties?

A. No, the investigational expenses paid in connection with these properties are part of the $146,000.

Q. They are?

A. They are.

Q. Well, actually, as I recall, the cost of the Home Light, Heat & Power Company was only $390,000, and you

arrive at the $412,520 figure,—$22,520 was added for interest and legal and investigation expenses, was it not?

A. No, I did not say that they were investigation expenses. I said that they were additional expenditures in connection with the acquisition. I might make it clear that they were not investigation expenses as we have been considering investigation expenses.

Q. How can we be certain that that sum of $22,000 includes none of the items of expense which were subsequently received by Electric Bond and Share Company as part of that $146,255 figure?

[7727] A. Off the record.

(Discussion off the record.)

By MR. BERMAN:

Q. Then as I understand you, Mr. Wiegers, you are certain that there was no duplication in these items of expenses received as part of that $146,255 figure, that they were completely different from the expenses included in the $412,520 figure?

A. They were entirely separate.

Q. The profit of the $69,595 realized by Electric Bond and Share Company in connection with the Astoria securities was entered in the Profit Account of Electric Bond and Share Company?

A. $55,090 was recorded as profit on the sale to the syndicate. $14,505 net represents the result of the annual reappraisal of investments. The first item in 1906 was a revaluation downward of $9,670, and in 1908 a revaluation upward of $24,175, or a net of $14,505 revaluation upward.

Q. Then the $14,505 would have been credited to surplus, would it not?

A. Yes, that is my recollection.

Q. For revaluation of the portfolio?

A. Yes.

Q. So that in fact the full sum of $69,595 was carried to Surplus Account?

A. That is correct.

[7728] Q. I believe you told us in the course of your direct testimony, Mr. Wiegers, that it was a practice of Electric Bond and Share Company to revalue its portfolio each year, a practice which was discontinued about 1923, is that correct?

A. That is my recollection.

Q. And that practice was carried out by arbitrarily ascribing certain values to the securities carried in the portfolio at the close of each year?

A. No. The Board appointed a committee of directors to make a recommendation for a reappraisal of all of the assets of the company annually. My recollection from having seen the reports of these committees is that substantially all of the committee were members of the Board who were not associated with the Bond and Share Company.

Q. And on the basis of this report, the Board determined that a revaluation should be made?

A. That is correct.

Q. Was 1923 the last year in which this practice was carried on?

A. That is my recollection; that is the best of my recollection.

Q. Now, will you tell us what the syndicate received from the newly formed American Power & Light Company in return for conveying to the American Power & Light Company the securities [7729] acuired by it from Electric Bond and Share Company and the cash?

A. 25,000 shares of preferred stock and 54,978 shares of common stock.

Q. How many shares of preferred did you say?

A. 25,000 shares.

Q. And 55,000 shares of common?

A. 54,978. There were 22 shares for qualifying director shares.

Q. Who acquired those 22 shares?

A. Electric Bond and Share Company.

Q. Acquired them by assignment from the incorporators?

A. This record does not indicate whether or not it was by assignment by those incorporators.

Q. So that actually 55,000 shares of common were issued and found its way to the syndicate members?

A. *That is correct. To the syndicate manager.*

Q. To the syndicate manager, yes. The syndicate made arrangements, did it not, to market certain of the preferred stock of American Power & Light Company and to give with the preferred stock so marketed a certain number of shares of common as bonus; is that not a fact?

A. The syndicate received subscriptions for 25,000 shares of preferred stock with which was issued 20,000 shares of common [7730] stock for cash of $2,500,000.

Q. That is on the basis of 4/5ths of a share of common for each share of preferred stock?

A. That is correct.

Q. Are you aware of the fact that certain of these shares were offered and sold in Great Britain?

A. I have heard that is true, yes.

Q. And are you aware of the fact that the British offer was on the basis of one share of preferred stock plus a bonus of one-half of one share of the common?

A. I believe that is what the circular said, yes.

Q. Can you tell us who received or who retained the difference between the 3/10ths of a share based on what the syndicate received and the British public received?

A. No, I cannot. The records indicate that each subscriber who subscribed to the preferred stock was given common stock at the rate of 8 shares of common stock for each 10 shares of preferred stock.

Q. Can you tell us how many shares were disposed of in Great Britain at the time of the initial offer?

A. No, I cannot.

Q. Do you have a record of the syndicate account showing receipts from the marketing of the securities and from whom received?

[7731] A. Our records indicate from whom the cash was received upon the sale of the $2,500,000 par value of pre-

ferred stock and the $2,000,000 par value of common stock. I do not have that record here at the hearing this morning with me.

Q. Will you kindly forward to us an itemization of the amounts received showing from whom received as taken from the records of the company?

A. Yes, I will.

Q. Of the remaining shares in the hands of the syndicate, which aggregated 35,000 shares of common, Mr. Wiegers, did the syndicate manager distribute certain of these shares to brokers and dealers for services rendered in connection with the distribution of the securities?

A. Yes, there were 7981 shares so distributed.

Q. Do you have a list of the dealers and brokers to whom this distribution was made?

A. The record will indicate it; I do not have it here.

Q. Will you kindly furnish us that information?

A. I will.

Q. With how many shares of common stock did that leave the syndicate?

A. There were remaining 27,019 shares of common stock.

Q. Those were $100 par value shares, were they not?

A. Yes, they were.

Q. Electric Bond and Share Company was a 60-percent [7732] participant in that syndicate?

A. That is correct.

Q. And how many shares did it receive as its participation?

A. 16,211.

Q. What was done with the remaining 10,808 shares?

A. Those shares were distributed to the other original syndicate participants.

Q. In the contract or agreement between Bonbright and Electric Bond and Share Company, was it not provided that Bonbright and Company would agree to accord participations to various officers and employees of Electric Bond and Share Company and various bankers and others

whom Bond and Share deemed useful to it, or words to that effect?

A. As I have said before, I have never seen the contract, but I think the minutes of Bond and Share of August 5, 1909 refer to this contract between Bond and Share and Bonbright and Company, and sets forth that Bonbright and Company would out of their total participation of $1,000,000 permit others to subscribe, persons whom it was considered may be interested in the project.

Q. Was not the actual language of the minute "with the understanding, however, that Bonbright and Company shall give to employees of this company and to such other persons or banks as the officers of this company deem it desirable to interest in [7733] the project a reasonable proportion of their 2/5ths allotment in the syndicate"?

A. Mr. Berman, you having read from a document that I furnished you, I am certain that it is correct.

MR. BERMAN: The excerpt is from the minute of the Executive Committee meeting of August 5, 1909 which is in evidence in this proceeding as Commission's Exhibit 135.

May we have a brief recess at this point?

THE EXAMINER: Yes, we will take a short recess.

(At this point, a short recess is taken, after which the hearing is resumed.)

By MR. BERMAN:

Q. Will you kindly tell us, Mr. Wiegers, who the persons were to whom Bonbright and Company granted participations pursuant to the understanding between Bonbright and Bond and Share? Do you have a list of those persons?

A. I have a list here of all of the syndicate participants.

Q. May I have a copy of that?

A. (Handing paper to counsel.)

MR. BERMAN: I ask that this list be received as Commission's Exhibit 143.

THE EXAMINER: Admitted.

(Commission's Exhibit 143 received in evidence.)

[7734] By MR. BERMAN:

Q. Running down this list, Mr. Wiegers, will you kindly identify the individuals on it for us?

A. I will as far as I can, Mr. Berman.

Mr. Mitchell was associated with Electric Bond and Share Company.

Mr. Coffin was with the General Electric Company.

Q. He was its president, was he not, or the Chairman of the Board?

A. I don't know whether he was Chairman of the Board or president. I do know that he was associated with General Electric Company.

Q. In a high executive capacity?

A. In an executive capacity.

Bonbright & Company.

Messrs. Randle, Davidson and Wilbur—the only method I have to identify those people are that they were parties to one of the agreements for the purchase of some of the Kansas properties.

Q. They were concerned in that Wichita situation, were they not?

A. That is correct.

Q. Mr. Breed—

A. (Interrupting) I believe the record shows that Mr. [7735] Breed was an officer of American Gas & Electric Company and was or shortly thereafter became its president. Is that your recollection?

A. My recollection is that he was an executive then with the American Gas; I don't know whether he was at this time, but I know that subsequently he was.

Mr. A. M. Young, I believe was a director of Bond and Share.

Chas. Pratt & Company—I don't know exactly who they were.

F. A. Vanderlip was associated with the National City Bank of New York, as I recall it.

I don't know Mr. Leon Van den Bosch, nor M. P. Clough.

A. W. Burchard, I think was in American Gas & Electric Company.

Q. He was also assistant to the president of the General Electric Company, was he not?

A. I don't know that, but I know that subsequently he was in the American Gas & Electric Company.

Hinsdill Parsons was a director of Bond and Share Company.

Q. General counsel of the General Electric Company as well, was he not?

A. I don't know that.

Mr. Tidd—I don't know what he was at this time, but I know that he later became president of American Gas & Electric Company.

I don't know Mr. McKee.

Myron T. Herrick, I know him as a former Ambassador to France.

[7736] I don't know Gordon, nor Eddy, nor Maxwell.

F. L. Dame was associated with Electric Bond and Share Company at that time.

Q. Wasn't Maxwell one of those concerned in the purchase of the property of the Home Light, Heat & Power Company of Kansas?

A. There was a C. M. Maxwell who was interested in that purchase, yes.

A. E. Smith was associated with Electric Bond and Share Company.

Frank B. Ball—I don't know his connection at that time, but I think later on he became associated with American Gas & Electric.

E. W. Hill was associated with Electric Bond and Share Company.

I don't know Lovejoy.

H. H. Dean was I believe a vice president of Electric Bond and Share Company.

I don't know Nash.

Russell Armstrong was associated with Electric Bond and Share Company, as was George J. Anderson.

F. G. Sykes was with Electric Bond and Share Company.

A. C. Dickson and D. F. McGee were in the employ of Electric Bond and Share Company, as was R. J. McClelland.

[7737] I don't know C. P. Hamilton.

Q. Wasn't Mr. C. P. Hamilton the gentleman who acted as intermediary?

A. No, sir, that was C. M. Hamilton.

Q. Wasn't C. P. Hamilton associated with General Electric Company?

A. I don't know.

The next is Adam Gschwindt, and I don't know who he was.

I don't know Conklin, Shain, nor Campbell.

M. H. Arning was associated with Electric Bond and Share Company.

E. P. Summerson was associated with Electric Bond and Share Company.

Q. In what capacity was Mr. Arning associated with Electric Bond and Share Company? Was he an auditor?

A. I don't know; I don't have the record here.

I don't know Fitting and I don't know Webber.

MR. MACLANE: May I say that our records here do not indicate that H. H. Dean was associated with Bond and Share at that time.

THE WITNESS: I may have been in error, Judge, when I said that he was a vice president. I am sure that there was an H. H. Dean associated with the company.

MR. MACLANE: That is, there was one in the employ of the company?

[7738] THE WITNESS: There was one in the employ of the company. I may have been in error in stating he was a vice president.

MR. MACLANE: One of the gentlemen of the Commission suggested that he was a vice president, and now our tabulation of officers and directors does not indicate that he was a vice president.

MR. BERMAN: It is not material so long as we are sure that he was associated.

By MR. BERMAN:

Q. When the distribution was made of the 10,808 shares of common stock remaining after Electric Bond & Share Company received 16,211 for its 60-percent participation, were the securities distributed on a ratable basis to the persons whose names are listed on this exhibit?

A. I think that is correct.

Q. How did Electric Bond and Share Company treat on its books the 16,211 shares of common stock of American Power & Light Company which it received through the syndicate participation?

A. The 16,211 shares so received were recorded in the Investment Account of Electric Bond and Share Company at $243,165.

Q. On the books of the American Power & Light Company, these shares had a par value of $1,621,100, did they not?

[7739] A. That is correct.

Q. On what basis was this sum of $243,165 recorded on the ledgers of Electric Bond and Share Company?

A. As I recall it, they were accorded at an appraised value of $15 per share.

Q. That sum did not represent, nor did it purport to represent any investment that the Electric Bond and Share Company had in those shares, did it?

A. As I recall the entry, it said that these shares were received for services in connection with the syndicate and were to be recorded at $243,165.

Q. Actually, so far as the investment went, it is a fact, is it not, Mr. Wiegers, that Electric Bond and Share Company had recovered back every dollar that it had theretofore invested in the various properties which went to American Power & Light Company; it had recovered back all sums expended by it as expense or incurred in connection with management; it had recovered back interest on such disbursement; and it had recorded as carried to surplus the sum of $69,595 as profit on the Astoria securities; isn't that so?

A. I think that this Exhibit 142 indicates the aggregate of charges to the syndicate of $2,500,000 was reimbursed by the proceeds from the sale of preferred stock.

Q. I think you misunderstood my question. My question was [7740] as to Electric Bond and Share Company's investment position in respect to the properties turned over to the syndicate. It is a fact, is it not, that at the time Electric Bond and Share Company received these 16,211 shares of common stock of American Power & Light Company, Electric Bond and Share Company had recovered back all sums it had invested in the properties, conveyed to the syndicate, all sums to which it had committed itself, all sums it had expended in connection with these properties in any way, interest on any such disbursements, and a profit on the Astoria properties of $69,595; isn't that so?

A. I think that is so.

Q. Actually it had on its books no amount which represented any expenditure or investment of any money in connection with these properties, isn't that so?

A. No expenditure that could be specifically assigned as cost of these properties other than those that were recorded in this tabulation.

Q. All of which it had recovered back?

A. All of which it had recovered back, yes.

Q. Plus that $69,595 carried to Surplus?

MR. MACLANE: May I just suggest that possibly there is a little obscurity about that. Wouldn't you

better say that it had recovered it back or did recover it back, because you are relating two things in time, and this account runs almost two [7741] years?

MR. BERMAN: I am willing to phrase the question in the terms of Judge MacLane's amendment.

By MR. BERMAN:

Q. Now, can you reply in the affirmative to that question?

A. Yes.

Q. And our computations have already made allowance for the $80,223.66 subsequently paid in 1911 and 1912 to American Power & Light Company through Hamilton, isn't that so?

A. That is correct.

Q. In addition to the sums we have heretofore stated, is it not a fact that Electric Bond and Share Company received certain sums as an arbitrary allowance for expenses and services in connection with the syndicate operations?

A. As I recall it, the syndicate participants other than Electric Bond and Share Company paid an amount equal to 5 percent of their participation to Electric Bond and Share Company.

Q. Since their participation aggregated $1,000,000, that made $50,000, did it not?

A. That is correct.

Q. How did Electric Bond and Share Company treat the sum of $50,000 received from the syndicate participants?

A. That was taken into the Income Account or Surplus Account of Electric Bond and Share Company.

[7742] Q. Did Electric Bond and Share Company record any actual expenses in connection with the syndicate operation other than those involved in the syndicate's operations and charged against the syndicate account prior to distribution of the net proceeds?

A. I don't think that this table includes the salaries of the executives and others who devoted their time to the syndicate.

Q. In other words, if there is any expense applicable to the $50,000 received, it would be such as was derived from whatever time executives of Electric Bond and Share Company spent in connection with the syndicate's affairs; is that correct?

A. That is correct.

And such amount would have been absorbed in the expenses of Electric Bond and Share Company.

Q. But no definite amount of any kind was entered against the $50,000 received from the syndicate participants?

A. That is correct.

Q. Actually, that sum was entered in the Income of Electric Bond and Share Company?

A. That is correct.

Q. Is it therefore a fair conclusion that the 16,211 shares of common stock of American Power & Light Company received by Electric Bond and Share Company represented no cash investment whatever at the time they were received?

[7743] A. I do not think that any specific amount expended could be indicated as applicable to the 16,211 shares of stock.

Q. Is it not a further fact that in connection with the acquisition of these shares, Electric Bond and Share Company had recovered its entire previous investment and realized a profit of $69,595, and further realized $50,000 carried to its Income Account from the syndicate?

A. Yes, they did do that. However, again, I want to point out that there was the time of the executives that was devoted to the operation of the syndicate that was not necessarily set forth as such and which amounts would have been absorbed in the expenses of Electric Bond and Share Company.

Q. Well, the executives of Electric Bond and Share Company would have been required to spend time on any sales or purchases made by Electric Bond and Share Company, would they not?

A. That is correct.

Q. So that no executives received any extra compensation, so far as you know, did they?

A. That is correct. My point is that had there been specific expenses assigned to specific classes of income, there might well have been an amount which would offset or partially offset the $50,000 placed to Income.

Q. If executives of Electric Bond and Share Company were using part of the time which they owed to their corporation because [7744] they were paid by their corporation in connection with the affairs of this syndicate, should not those executives who participated as syndicate members have made reimbursement to the corporation for part of their time which was devoted to their own personal affairs in connection with this syndicate?

MR. MACLANE: I object to this excursion into ethics.

MR. BERMAN: This is not an excursion into ethics; this is an excursion into the manner in which costs may be computed or allocated, and if Mr. Wiegers desires to raise, and he indicated he does, the question of whether Bond and Share did not incur certain amount of costs by reason of the time spent by its executives, I ask Mr. Wiegers to tell me whether the executives of Bond and Share who were syndicate participants in their own personal capacity and profited therefrom, made some adjustments to the corporation for the time that they expended in connection with their personal affairs.

THE WITNESS: The point that I was trying to bring out, Mr. Berman, was that the income of Bond and Share was in one account, and all the expenses of Bond and Share Company was in another account, and

that one item of expense could not be specifically tied into the item of income. That is what I was trying to point out.

By MR. BERMAN:

Q. Mr. Sidney Z. Mitchell, the president of Electric Bond [7745] and Share Company, was a participant in this syndicate to the extent of $200,000, was he not?

A. That is correct.

Q. He recovered back his entire $200,000 and he received in addition a certain number of shares of common stock of American Power & Light Company, did he not?

A. I think that is true.

Q. Actually, he must have received 1/5th of the 10,808 shares which remained with Bonbright as a participant, isn't that correct?

A. I think that is approximately correct.

Q. Which would have given him some 2,161 shares?

A. That is approximately correct, yes.

Q. You say that Electric Bond and Share Company recorded these shares at an appraised value of $15 each. If we applied the same basis to what Mr. Mitchell received, how much would have been his dollar realization at the outset?

A. $32,415.

Q. And we know also that various other executives of Electric Bond and Share Company likewise received common stock of American Power & Light Company which represented a profit in varying amounts to each of them, isn't that so, Mr. Wiegers?

A. That is correct.

Q. Actually, can you tell us what market value the 27,019 [7746] shares of common stock of American Power & Light Company received by the syndicate after payment of all expenses came to equal?

A. No, sir; I have not the slightest idea.

Q. Do you not know what the highest price reached by this stock on the market was in the succeeding years?

A. I cannot say that I do; I don't recollect.

Q. The $243,165 which Electric Bond and Share Company ascribed on its books as the ledger value of the 16,211 shares received, did that remain constant or was it the subject of reappraisals through the years in the manner which you have described previously?

A. I am sure that it was subject to reappraisals in the manner I have previously described, because all of the assets of Electric Bond and Share Company were considered by the Reappraisal Committee.

Q. Is there any way that you can tell us what part of the sum at which Electric Bond and Share Company today carries its investment in the common stock of the American Power & Light Company is attributable to the original 16,211 shares received by the Electric Bond and Share Company at the time of American Power & Light Company's organization?

A. I know I cannot tell you right now. I should have to look at the records to see whether or not such an amount was [7747] ascertainable.

Q. Now, Mr. Wiegers, let me ask you this. We are agreed, are we not, that the initial 16,211 shares of common stock of American Power & Light Company represented no cash investment whatever by Electric Bond and Share Company, isn't that so?

A. Technically speaking, I think we have agreed on that.

COMMISSION'S EXHIBIT 494

A meeting of the Board of Directors of ELECTRIC BOND AND SHARE COMPANY was held at No. 71 Broadway, New York, N.Y., on Wednesday, March 11, 1925 at 3:30 o'clock in the afternoon.

Present: Messrs. H. C. Abell, A. C. Bedford, S. R. Bertron, F. A. Farrar, C. E. Groesbeck, E. K. Hall, E. W. Hill, E. G. Merrill, S. Z. Mitchell, F. B. Odlum, L. H. Parkhurst, Felix Rosen, Frank Silliman, Jr.

* * * * * *

The Chairman referred to the holdings of this Corporation in Power Securities Corporation, New Orleans Public Service Inc., Dallas Power & Light Company, Dallas Railway Company and Texas Interurban Railway, stating that they had been acquired for the most part in connection with reorganizations of operating utilities with the view of eventually vesting them in some holding or investment company somewhat in the manner followed in the case of American Power & Light Company and similar companies. He pointed out that Electric Bond and Share Company, with its limited capital, could not expect to keep as a permanent investment holdings of this character and magnitude and as such holder provide the substantial amount of additional money needed from time to time to expand such operating properties to meet the demands for increased service. He stated that plans had been under consideration for a very considerable length of time, and particularly since the acquisition of New Orleans Public Service Inc. common stock, for the organization of a new holding or investment company whose security holders would have the benefit of the geographical, climatic and industrial diversity afforded by the operating companies involved. He recommended the

present formation of such a company in conjunction with Utah Securities Corporation and outlined a plan that had been discussed with the parties interested, which was substantially as follows:

That a corporation would be organized under the laws of the State of Maine and that Utah Securities Corporation reorganize by turning over all its assets to this Corporation, subject to all of its liabilities, for a sum in cash equal to $10. plus four shares of the New Company's common stock for each share of common stock of Utah Securities Corporation outstanding; that this New Corporation would acquire from Electric Bond and Share Company substantially all of its holdings in Power Securities Corporation, New Orleans Public Service Inc., Dallas Power & Light Company, Dallas Railway Company and Texas Interurban Railway (Utilities Finance Corporation) the price to be paid as of December 31, 1924 to be approximately $25,500,000. cash, plus approximately 50,000 shares of the new company's common stock and 320,000 option warrants to purchase additional common stock at $25. per share; that the New Corporation would raise the funds to carry out the reorganization of Utah Securities Corporation and the purchase from Electric Bond and Share Company of additional holdings as well as funds for the development, extension and improvement of the operating properties, through the sale to the public through some banking house or houses employed for the purpose, at $100. per share and accrued dividends, of 400,000 shares of voting preferred stock (carrying cumulative dividends at the rate of $7. per share per annum) 40% of the purchase price to be paid immediately and the balance in 10% instalments on call; that the purchaser of each one share of such preferred stock, upon payment therefor in full, would also receive one-half share of common stock of the New Company. He stated that the parties interested had agreed that it would be very beneficial to the plan to have someone purchase for cash approximately 120,000 shares of second preferred cumulative stock at approximately $94. per share, with which

would be delivered 60,000 shares of common stock and 480,000 option warrants to buy additional common stock at $25. per share, with the right to surrender second preferred stock at $100. per share and accrued in payment for such common stock in connection with the warrants. He stated that if the Board approved the sale of Electric Bond and Share Company's holdings in these companies, as outlined, he would also like to have the Board's authority to purchase this second preferred stock, not for the purpose of holding more than a small portion, if any thereof, but for the purpose of distribution of all or a substantial part thereof to officers, directors and employees of Electric Bond and Share Company and the other companies interested and to other persons, firms and corporations that might prove helpful to the Electric Bond and Share Company and the new company. He also stated his desire to purchase approximately 50,000 shares of such preferred stock for distribution in like manner.

He stated that Electric Bond and Share Company holds certain Income Bonds of New Orleans Public Service Inc. and certain First Mortgage Bonds of Dallas Railway Company and Dallas Terminal Corporation, which could later be disposed of on advantageous terms through public offering and, consequently, it was planned to retain these rather than to vest them in the New Company, and that the price of approximately $25,500,000. was intended to cover only the following:

Power Securities Corporation		
Second Preferred Stock	16,412.765	Shares
Common Stock	119,478	"
Collateral Trust Bonds 6s	$ 318,600	
Secured Income Bonds 6s	1,556,300	
New Orleans Public Service Inc.		
Common Stock (or voting trust certificate therefor)	652,729.725	Shares
Dallas Power & Light Company		
Preferred Stock	8	Shares
Common Stock	113,750	"
Dallas Railway Company		
Preferred Stock	5,000	Shares
Common Stock	20,599	"

Demand Notes 7s	$ 575,000	
Demand Notes 6s	150,000	
Income Notes 6s	2,529,868.59	
Texas Interurban Railway Company		
Preferred Stock	10,000	Shares
Common Stock	15,000	"
Notes 6s, 1932	$2,500,000	
Dallas Hotel Company		
Common Stock	15	Shares
Dallas Ice Factory		
7% Mortgage Notes	$ 70,000	
Dallas Power & Light Company Inc. (N.Y.)		
Capital Stock	5	Shares
New Orleans Public Service Inc. (N.Y.)		
Capital Stock	5	Shares
Advance to C. E. Calder	$ 7,500	

After discussion and on motion duly made, seconded and carried, it was

RESOLVED that the general plans of the officers of this Corporation with respect to certain of the holdings of this Corporation in securities of Power Securities Corporation, Dallas Power & Light Company, New Orleans Public Service Inc., Dallas Railway Company and Texas Interurban Railway Company as outlined by the Chairman be, and the same hereby are, approved in principle; and further

RESOLVED that the officers of this Corporation be, and they hereby are, authorized to sell the following securities of this Corporation for such price as may be approved by the officers of this Corporation, not less than $25,000,000 cash as of December 31, 1924, plus the delivery to this Corporation of 50,000 shares of common stock of the New Corporation to be formed to take over the assets of Utah Securities Corporation and not less than 300,000 option warrants of the said New Corporation to buy additional common stock at $25. per share:

Power Securities Corporation		
Second Preferred Stock	16,412.765	Shares
Common Stock	119,478	"
Collateral Trust Bonds 6s	$ 318,600	
Secured Income Bonds 6s	1,556,300	
New Orleans Public Service Inc.		
Common Stock (or voting Trust Certificate therefor)	652,729.725	Shares
Dallas Power & Light Company		
Preferred Stock	8	Shares
Common Stock	113,750	"
Dallas Railway Company		
Preferred Stock	5,000	Shares
Common Stock	20,599	"
Demand Notes 7s	$ 575,000	
Demand Notes 6s	150,000	
Income Notes 6s	2,529,868.59	
Texas Interurban Railway Company		
Preferred Stock	10,000	Shares
Common Stock	15,000	"
Notes 6s, 1932	$2,500,000	
Dallas Hotel Company		
Common Stock	15	Shares
Dallas Ice Factory		
7% Mortgage Notes	$ 70,000	
Dallas Power & Light Company Inc. (N.Y.)		
Capital Stock	5	Shares
New Orleans Public Service Inc. (N.Y.)		
Capital Stock	5	Shares
Advance to C. E. Calder	$ 7,500	

and further

RESOLVED that the officers of this Corporation be, and they hereby are authorized to purchase from the New Corporation, either directly or through such investment bankers as are employed to make a public offering (a) 120,000 shares of second preferred stock at $94. per share, plus accrued dividends, with which will be delivered 60,000 shares of common stock and 480,000 option warrants to buy common stock at $25. per share; and (b) not to exceed 75,000 shares of preferred stock of said New Company, and to distribute, at the cost thereof, to such persons, firms and

corporations as the Chairman shall select, all or any part of the preferred stock, second preferred stock and other securities so purchased. It was further

RESOLVED that the officers of this Corporation be, and they are hereby authorized to take all steps and do all things necessary to complete the formation of the New Company and the reorganization of Utah Securities Corporation and the sale of the specified assets of this Corporation to such New Company, all substantially in accordance with the plans outlined by the Chairman at this meeting.

The Chairman outlined to the Board the history of the acquisition of this Company's holdings in Power Securities Corporation and the arrangements he had made with Charles Hayden at approximately the time that a portion of such acquisitions in Power Securities Corporation were sold at cost to certain persons, firms and corporations, to sell to Mr. Hayden a substantial block of said securities. He stated that in view of the many transactions which had taken place since the time of such arrangements, he was of the opinion it would be advantageous to sell to Mr. Hayden, if acceptable to him, a small interest in the securities which will be disposed of by this Corporation in connection with the reorganization of Utah Securities Corporation, this interest or participation to substitute for the original arrangement.

After discussion, and on motion duly made, seconded and carried, it was

RESOLVED that the Chairman of the Board be and he hereby is authorized and empowered to offer to Charles Hayden a $300,000. participation at cost in the securities owned by this Corporation, and which will be by it sold, assigned and transferred to the Corporation resulting from a reorganization of Utah Securities Corporation, this participation to be in lieu of and to substitute for the arrange-

ment made previously whereby Mr. Hayden might purchase certain of this Corporation's holdings in securities of Power Securities Corporation.

The balance sheet of the Company for the period ended December 31, 1924 was presented to the meeting, which showed that the surplus earnings were sufficient to declare a dividend of 2% on the outstanding common capital stock of the Company.

Whereupon, it was

VOTED that a dividend of 2% on the common capital stock of the Company be and the same hereby is declared from the surplus earnings of the Company for payment March 11, 1925 to the stockholders of record at the close of business on said date.

There being no further business, the meeting

Adjourned

E. P. SUMMERSON,
Secretary.

JOE H. GILL, President of Electric Power & Light Corporation.

CROSS-EXAMINATION

[17788] Q. Now, let us turn to see if we can summarize in a cohesive fashion the situation as it affected Electric Bond & Share Company.

Electric Bond and Share Company took three types of action with respect to Electric Power & Light Corporation, did it not, Mr. Gill, namely, as a stockholder of Utah Securities Corporation it turned in its Utah common stock and received Electric Power & Light common and cash in exchange?

A. That is correct.

Q. As the owner of that basket of Power securities, Dallas and New Orleans securities, it turned those over to Electric Power & Light Corporation via deBuys, and received certain cash and common stock and options, did it not?

A. Yes, I think you can say it did that.

Q. And then it also subscribed for second preferred stock of Electric at $94 a share and arranged to distribute that second preferred among various persons and to pay over an [17789] agreed price to Electric for it?

A. That is correct.

Q. It also had a certain responsibility in procuring Bonbright to act as the underwriter with respect to the first preferred stock and it did make the arrangements with Bonbright?

A. I assume that is correct.

Q. Now, Mr. Wiegers has already testified at page 12,561 of the record that in March of 1925 Electric Bond and Share Company owned some 56,193 shares of the common stock of Utah Securities Corporation at a cost (set forth at page 12,563 of the transcript) of $609,975.63.

Will you verify that, please?

A. That is correct.

Q. Now for that Electric Bond and Share necessarily received $561,930 in cash and 224,772 shares of common stock of Electric Power & Light Corporation, did it not?

A. That is correct.

Q. So that the cash Electric Bond and Share Corporation received in the Utah deal fell just about $45,000 short of giving it its entire cost of its investment in the Utah Securities Corporation situation, leaving it with the 224,772 shares of common stock of Electric, costing it $48,045?

A. $48,045, that is correct.

[17790] Q. Now, on the other hand, Electric Bond and Share Company received the cancellation of $440,564 of duplicate service fees which it had collected from Utah Securities Corporation and Utah Power & Light Company which was cancelled in this deal. Isn't that true?

A. Well, Utah Securities released it from any claim it had on that $440,561.81.

Q. It was found, as I think we discussed earlier, that Bond and Share had collected service fees for the same services from both Utility Power & Light and Utah Securities Corporation in an amount of $440,564, and that Utah Securities Corporation had a claim to recover back that duplicate amount?

A. That is correct.

Q. Which was released to Bond and Share?

A. That is correct.

[17791] Q. Therefore, the cancellation of that $440,564 was the cancellation of an amount owing by Bond and Share to Utah Securities Corporation and should be offset against the cost of the 224,772 shares of common stock, leaving Bond and Share with a cost of about minus $400,000 for that 224,772 shares. Wouldn't you agree?

A. That would be the correct interpretation from the standpoint of Utah Securities and the standpoint of its claim. Just what position Bond and Share would take, I am not prepared to say.

Q. Now, that accounts for one group of securities received by Bond and Share in connection with the formation of Electric. In addition, for turning over to Electric the basket of securities which had cost Bond and Share $21,085,424 it received $25,448,512 in cash and—

A. Wait a minute.

Q. From deBuys?

A. That is correct.

Q. And it also received 310,000 shares of common stock of Electric Power & Light Corporation and 800,000 option warrants?

A. That is correct.

Q. Of that 310,000 shares of common stock Electric Bond and Share subsequently redistributed to Bonbright, to [17792] the purchasers of the second preferred stock, 255,260 shares, leaving it with approximately the 65,000 shares of which we spoke earlier. Isn't that so?

A. I don't know. I thought it delivered 200,000 to Bonbright and 60,000 to the purchasers of the second preferred stock.

Off the record.

(Discussion off the record.)

By MR. BERMAN:

Q. It did, but of course it retained some of the second preferred and thereby retained some of the common, but leaving that out of consideration for the moment, deduct the 60,000 for the second preferred and the 200,000 to Bonbright, leaving it at this point with 50,000 shares of common?

A. Yes.

Q. And how many option warrants out of 800,000 remained with it?

A. If we were correct in our assumption this morning that it placed four option warrant out with each share of second preferred, it would have placed out 480,000, and retained 420,000 for its own account.

Q. Now, at that point is it correct to say that by virtue of transferring the basket of securities Electric Bond and Share Company received in cash more than $4,000,000 in [17793] excess of its entire cost of those securities, and in addition held 50,000 shares of common stock of Electric Power & Light and 320,000 option warrants without cost to it?

A. That would be correct.

Q. Now, Electric Bond and Share turned around and subscribed to 120,000 shares of second preferred of Electric Power & Light at $94 per share, and immediately sold 110,520 shares of this second preferred to this select list we have been speaking of, together with a half share of common for each share of second preferred, and the four option warrants, all of which we have accounted for already, but that left Electric Bond and Share with approximately 9,480 shares of second preferred stock?

A. That is correct.

Q. That residium of second preferred stock which Electric retained carried with it 4,740 shares of common and 37,920 options.

A. In their general unit that we have been discussing that would be correct.

Q. And these were entered in the investment account of Electric Bond and Share according to the company's records at $854,904 for the second preferred, $36,216 for the 4,740 shares of common and the options, or a total of $891,120.

I show you Bond and Share's investment account and ask [17794] you whether you note those figures, Mr. Gill.

A. Yes. There is an entry in the investment account of Electric Bond and Share which you have shown me which sets forth as of the end of December, 1926 a balance of 9,480 shares of second preferred stock or Electric Power & Light at $854,904 as book value.

Q. And the common stock entries are scattered around but, suppose we assume that the $36,000-figure I mentioned is correct, subject to check by Mr. Wiegers.

A. That is satisfactory.

Q. Now, if I collect these various figures on the Electric Bond and Share, we have 50,000 shares of common from the basket, we have 224,772 shares from Utah Securities Corporation, we have 4,740 shares acquired in connection with the second preferred retained, we have 279,512 shares of common in all, and approximately 400,000 option warrants.

A. That is correct.

Q. In addition there were these 9,480 shares of second preferred stock?

A. That is correct.

Q. Now, as against that for the first 50,000 shares we agreed we have an equivalent of a cost of minus $400,000 approximately; for the first block of 224,772 we agree we had a cost of approximately minus $400,000, for the second block [17795] of 50,000 shares giving effect to the excess of cash received over cost we would have a minus cost of approximately $4,200,000 or, so far minus $4,600,000 against which we must credit $891,120 for the 9,480 shares of second preferred and the 4,740 common and the block of option warrants, must we not, leaving a minus figure of approximately $3,700,000. Is that not so?

A. That is correct.

Q. And just to be sure we are straight on that, as against that minus $3,700,000-figure we have Bond and Share owning 279,512 shares of common stock, approximately 400,000 option warrants and 9,480 shares of second preferred?

A. That is correct.

Q. Now, those 279,512 shares of common stock and the 9,480 shares of second preferred stock gave Electric Bond and Share Company approximately 16 per cent of the outstanding voting securities.

A. That is my recollection.

Q. As a matter of fact, Mr. Gill, Electric Bond and Share Company actually picked up another 19,534 shares

of common stock by virtue of purchasing from Chase Securities Corporation and Chase Bank in July and August of 1925, blocks of the first preferred carrying a bonus common with it, and sold off the first preferred, recovering back its cost and [17796] making a profit, and retaining the common stock that went with the first preferred at no cost, or a minus cost. Are you familiar with those transactions at all?

A. No, I am not. I would be perfectly willing to say so on your word, but they are Bond and Share's accounts and I would not know how to trace them.

Q. However, it may be noted here that if effect be given to the 19,534 shares acquired in that way, Bond and Share had an initial position of 299,772 shares rather than the 279,512 of which we have spoken.

A. I think that is also stated in the stipulation.

Q. That is set forth at page 961 of the stipulation of facts, being Commission's Exhibit 68-D in evidence in this proceeding, I believe.

Now, the fact of the matter is, is it not, Mr. Gill, that Electric Bond and Share although owning only 16 per cent of the voting securities, had effective voting control of Electric Power & Light Corporation from the very beginning, did it not?

A. That is correct.

Q. That followed not only by virtue of the fact that Electric Bond and Share had this concentrated block of stock, but also because Electric Bond and Share Company was in a position to and did nominate the board of directors of Electric Power & Light Corporation, more than a majority of whom [17797] at all times were affiliated with Electric Bond and Share Company and by virtue of the fact that a service contract was entered into between Electric Power & Light Corporation and Electric Bond and Share Company, whereby Bond and Share acquainted its employees, officers of Electric Power & Light and its employees kept the books of Electric Power & Light Corporation and ran the business in every detail. Isn't that true?

A. That is correct.

Q. Looking at the transaction in its overall aspects, Mr. Gill, would you not say that the effect of this situation was that Electric Bond and Share Company got back all of its investment in all the situations which were turned over to Electric Power & Light plus this substantial profit of approximately $4,000,000, and in addition it owned the securities of Electric Power & Light Corporation without cost and it controlled Electric Power & Light Corporation?

A. I think that is the effect of the facts set forth in the record.

Q. As part of the service contract which was executed between Electric Bond and Share Company and Electric Power & Light Corporation, Electric Power & Light Corporation agreed to have its subsidiaries also enter into service contracts with Electric Bond and Share Company, did it not?

A. In the proposal of Electric Bond and Share Company [17798] to Electric Power & Light, which was Exhibit D attached to Commission's Exhibit 507, the first paragraph states that:

> "We will coöperate with you so far as reasonable and proper for us so to do, to the end that each one of your subsidiary operating public utility companies will enter into a supervision agreement with us in the form attached, with such modification thereof or changes therein as may be mutually agreeable,"

and it makes reference to the period or periods and says that they will furnish the service when requested by the subsidiary or by Electric Power & Light to the same extent that such agreements have been executed and, states further the form of the contract that would be executed.

Q. Of course, that puts it in a rather negative sense, that Electric Bond and Share will coöperate with Electric Power & Light in getting Electric's subsidiaries to enter into service contracts with Bond and Share?

A. And in the deBuys agreement he agreed to have Electric Bond and Share enter into such an agreement with Electric and then—

Q. The fact of the matter is that all the subsidiaries of Electric Power & Light did receive services from Electric Bond and Share Company, did they not?

A. That is correct.

[17799] Q. And if I correctly recall the purport of your direct testimony in such cases as the Dallas companies and New Orleans Public Service, where the local authorities were apparently not disposed to allow these service fees to be paid by the operating companies as an expense in these years, Electric Power & Light Corporation had to pay that cost to Electric Bond and Share Company directly, did it not?

A. Yes, it had that agreement.

Q. I have never been clear on this point, Mr. Gill, as to whether Electric Power & Light Corporation was able to recover from the subsidiaries in any form the fees which it paid to Electric Bond and Share on their behalf.

MR. FROMEN: I think we have furnished a statement to that effect, Mr. Berman.

MR. BERMAN: What statement was that?

THE WITNESS: There were some recovered from the Dallas companies on the salaries allowed.

MR. FROMEN: That is Commission's Exhibit 777,

MR. BERMAN: Thank you.

By MR. BERMAN:

Q. Certain salaries were paid by the operating companies like Mr. Hill's, I think, in the case of one of the Dallas companies, but I mean when Electric paid the fees to Bond and Share—

[17800] A. You mean did Electric in turn collect any fees from subsidiaries to compensate itself for payments it had made to Bond and Share?

Q. Yes.

A. My recollection of the record and the facts is that it did not do so at anytime other than in the case of compensation paid certain individuals.

Q. Yes, I am familiar with that.

Well, in that respect, of course, that was an additional benefit to Electric Bond and Share arising from the superimposition of Electric Power & Light Corporation between Bond and Share and the operating companies, was it not, in that while Bond and Share owned the companies directly it was unable to get the fees in the cases where the companies were not permitted to pay them, but once Electric Power & Light Corporation came into the situation it was Electric which had to stand that cost but Bond and Share got the full fee?

A. There is no question but what Electric had to stand the full cost and I am sure Electric Bond and Share got the full fee.

Q. Whereas prior to that time Electric Bond and Share had not been able to collect—

A. I am not certain about that.

Q. Now, on the control features, there would seem to be [17801] be no necessity for elaborating on those. We have a pretty clear picture of the manner in which Electric Power & Light and the other subholding companies were operated up to 1935.

It is a fact, is it not, that until May 9, 1925, the directors of Electric Power & Light Corporation were either the clerks in the office of the Maine attorneys of Electric Bond and Share who formed the corporation, or clerks in the office of Simpson, Thacher & Bartlett, and it was not until June 5, 1925, that persons other than these clerks in the attorneys' office commenced to be put on the board of directors?

A. I don't want to say that all of these people were merely clerks in the attorneys' office. My recollection is that it was sometime in the latter part of May or the first part of June, 1925, when there were substantial changes made in the personnel of the board of directors, and that, as I recall it, Messrs. Cowan and—

Q. I didn't intend any insidious implication by the use of the term "clerks", Mr. Gill. Some of my best friends are clerks, but I believe that is the manner in which they are termed by law firms, indicating that they are not partners of the firm but young lawyers employed there.

A. I think some of them were partners.

Q. Some of them have subsequently risen to high position life?

[17802] A. I think until the changes made in June and September of 1925, particularly until early in June, 1925, the directors were members either of Southard, Fogg & McLean, attorneys at Augusta, Maine, or attorneys connected with the firm of Simpson, Thacher & Bartlett of New York City.

On about June 29th there was almost a complete shift in the personnel of the board.

Q. And at that time we find officers of Electric Bond and Share Company and of affiliated companies, together with other persons whom we recognize as having been on various Electric Bond and Share boards came into office?

A. That is correct.

Q. Of course, by June 29th the principal acts in connection with the setting up of this company, the issuance of its securities, the establishment of its balance sheet and even such important acts as the acquisition of Southern Power & Light, had taken place, had they not, Mr. Gill?

A. That is correct.

June 10, 1942

L. B. WIEGERS, Secretary and Treasurer of Electric Bond and Share Company.

CROSS-EXAMINATION

[18135] Q. Mr. Wiegers, at the outset of your testimony today I want to ask you to clear up a few points which are left in doubt with reference to the formation of Electric Power & Light Corporation in 1925.

You gave some testimony on that subject at page 12566 of the transcript and subsequent pages, and we have had testimony from Mr. Gill recently with reference to other phases of that same subject, and our desire at this time is to clear up some ambiguities.

At page 12566 of the transcript you testified that in connection with the formation of Electric Power & Light Corporation, Electric Bond and Share Company turned over to [18136] Electric Power and Light Corporation a basket of securities comprising Power Securities Company, the Dallas Company, New Orleans Public Service Company and other miscellaneous items for which Electric Bond and Share Company received a certain sum in cash, securities of Electric Power & Light Corporation and other considerations.

Do you recall your testimony in that regard?

A. Yes, I do.

Q. I think you stated that the amount of cash received for that basket was $25,448,512.

A. That is correct.

Q. In addition, Electric Bond and Share Company obtained a release from its obligation to repay $440,565 of duplicate service fees received from Utah Securities Corporation and its subsidiary, Utah Power & Light Company. Is that not true?

A. I am not certain that I said it was a duplication of fees but, as I do recall, it was said it was a release from the obligation, if any, that the Electric Bond and Share Com-

pany may have been under to reimburse to Utah Securities Corporation or Utah Power & Light Corporation, or its successor, for sums collected by Bond and Share for supervision fees amounting to approximately $440,564.81.

Q. In your testimony concerning Utah Securities Corporation I believe you did concede that there had arisen this [18137] question as to whether Bond and Share had not collected fees for the same services from both Utah Securities Corporation and its subsidiary, Utah Power & Light.

A. I recall that I did testify that such a question had arisen.

Q. And the amount involved was the sum referred to then, this $440,564-item, was it not?

A. That is correct.

Q. In addition to the cash and the release referred to, Electric Bond and Share Company also received 310,000 shares of common stock for this basket of securities, did it not?

A. And also 800,000 option warrants to purchase common stock of Electric Power & Light Corporation.

I would like to say, however, Mr. Berman, that the agreement under which the cash, release and the securities were received, also made certain provision for a disposition of a portion of the securities so received by Electric Bond and Share Company under that agreement.

Q. Yes. I think we have the agreements themselves in the record and I believe the record is clear as to that.

Now, you testified, I believe, that the cost of these securities transferred by Electric Bond and Share Company for the consideration we have just enumerated, was $21,273,584.

Will you tell us whether that figure is not slightly in [18138] error and whether actually the total cost as shown by the records of Bond and Share was not slightly less than the sum mentioned in the record?

THE WITNESS: Off the record.

(Discussion off the record.)

THE WITNESS: I do not have available with me the detailed figures from which I can check which of the two figures you have enumerated is correct. However, I will be pleased to furnish a table which will show, from the records of Electric Bond and Share Company, its cost of the securities delivered to Electric Power & Light Corporation pursuant to the agreement of March 12, 1925.

By MR. BERMAN:

Q. I wish you would do that, Mr. Wiegers, and will you also itemize separately any amounts contained in the investment account of Bond and Share with respect to these investments representing (a) reappraisal of the carrying value of such securities and (b) interest or dividends accrued or carried in that account? Will that be done?

A. I will do that, yes.

Q. We also note in connection with testimony given by you concerning Power Securities Corporation and Bond and Share's investment in such company, that there is a small discrepancy between the figures mentioned by you and a further discrepancy [18139] between figures shown by records of the company in our possession and the figures you have given.

At page 1264 you referred to Bond and Share's cost for Power Securities Corporation securities as $691,382.79. At page 1226 you referred to the sum of $661,671.53.

The investment account of Bond and Share in Power Securities Corporation seems to indicate a cost of $606,397.26.

We will appreciate it if you will clarify that situation and give us a definite and final figure.

A. This tabulation that I have agreed to prepare, I am sure will show that. Again, I think the difference there is cost and book value, the element of reappraisal entering into it.

Q. Mr. Wiegers, in connection with the reorganization

of Electric Power & Light Corporation, the $7 preferred stock of Electric was issued through an underwriting agreement between Electric Power & Light Corporation and Bonbright & Company, was it not?

A. That is correct.

Q. And the offering actually took the form of allotment certificates representing a share of $7 preferred stock plus one-half share of common stock, and providing for the payment of a certain amount down and the balance of the payments on call at various intervals?

[18140] A. That is correct. The original offering was for 400,000 allotment certificates which, when fully paid, entitled the holder to one share of $7 preferred stock and one-half share of common stock, and that is the reference I made before as to the Electric Bond and Share Company providing the 200,000 shares of common stock for the purpose of issuance of shares to the holders of the fully-paid allotment certificates.

Q. It is a fact, is it not, that on April 1, 1925, Electric Bond and Share Company purchased 50,000 blocks or allotment certificates from Bonbright & Company at $100 per share, with Bond and Share receiving back commission of $6 per allotment certificate?

A. The payment to Bonbright & Company at approximately April 1st was for a 40 per cent payment on 50,000 allotment certificates for $7 preferred stock and, the payment was made for $2,000,000.

Subsequently, and very closely thereafter, there was received a refund of $6 per allotment certificate.

Q. Now, did Electric Bond and Share dispose of all these 50,000 allotment certificates at its net cost of $94 per certificate to various affiliated persons and interests?

A. Electric Bond and Share Company disposed of 47,200 of the allotment certificates, the 40 per cent of paid allotment [18141] certificates at its cost. The balance of 2,800 of such allotment certificates were paid in fully by Electric Bond and Share Company and they in turn received

2,800 shares of $7 preferred stock and 1,400 share of common stock.

The 47,200 allotment certificates were sold to some 200—or 300-odd people.

Q. So that, as a result of the retention of the 2,800 allotment certificates, Bond and Share had in its investment portfolio 2,800 shares of $7 preferred and 1,400 shares of common stock?

A. That is correct.

Q. And certain of these shares were sold in the years 1927 and 1928, were they not, among other shares which were disposed of by Bond and Share?

A. That is correct.

Q. Is it a fact that in July and August of 1925 Electric Bond and Share Company purchased from Chase Securities Corporation and Chase National Bank, a total of 41,684 allotment certificates or blocks of preferred and common in the proportion previously mentioned?

A. That is correct.

Q. And will you tell us the prices that were paid for these blocks?

A. On July 15th 37,968 blocks were purchased at $100 [18142] per block and 3,168 blocks at $109 per block. On August 19th 548 blocks were purchased at $107.50 per block.

Q. As a result of this series of transactions we have just discussed in the allotment certificates for the $7 preferred stock of Electric Power & Light Corporation, is it true that when this account was closed out on March 13, 1929 as a result of sales which had been made of the transferred stock from time to time the account showed a profit of $106,869 and contained a balance of 485 shares of $7 preferred plus 19,534 shares of common stock?

A. Do you have a copy of the transcript of the investment account which I think indicates that quite clearly?

Off the record.

(Discussion off the record.)

THE WITNESS: The transcript of the investment account as previously furnished to the Commission does indicate what you have said, Mr. Berman. The transcript of the investment account of Electric Bond and Share Company may be identified at page 3 of a document entitled "Electric Bond and Share Company, transcript of investment accounts" and the first item "Electric Power & Light Corporation".

MR. BERMAN: Mr. Examiner, from time to time there has been reference in this proceeding to figures contained in transcripts of the various investment accounts of Electric [18143] Bond and Share Company and of the subholding companies in this proceeding.

We have been furnished by the respondents with numerous transcripts of these investment accounts.

Rather than encumber the record by asking that these transcripts be received in evidence, I am asking counsel for the respondents to stipulate with me that either side may, if it decides, refer to any data contained in these transcripts of investment accounts in their proposed findings of fact or in briefs, and the Commission may refer to any such data in making its findings and, in the event that any such data is relied on either by counsel in its proposed findings or by the Commission in its findings and opinion, that the specific matter relied on will then be indicated and made part of the formal record of this proceeding for purposes of review.

The purpose of this stipulation is to enable either side to rely on such data as they may find it necessary to rely on in these transcripts, without being placed under the necessity at this time of segregating such material, if there be any, or of incorporating the entire bulk of the material.

MR. HAWKINS: I would like to reserve an answer on that until later in the day.

MR. BERMAN: That is agreeable.

[18144] By MR. BERMAN:

Q. Now, Mr. Wiegers, in connection with the formation of Electric Power & Light Corporation, Electric Bond and Share Company agreed to and did subscribe to 120,000 shares of the $7 cumulative second preferred stock of Electric Power & Light Corporation at $94 per share. Is that not true?

A. That is correct and was pursuant to paragraph (c) of the previously referred to agreement dated March 12, 1925.

Q. And is it also a fact that Electric Bond and Share Company thereupon offered to allot to a selected list of subcribers this 120,000 shares of second preferred stock of Electric Power & Light Corporation, each share of which would carry with it one-half share of common stock of Electric Power & Light Corporation and four option warrants?

A. Of the 120,000 shares of second preferred stock and out of the common stock and option warrants acquired by Electric Bond and Share Company pursuant to the March 12, 1925 agreement, there was sold 110,520 shares of $7 second preferred stock, 55,260 shares of common stock and 42,080 option warrants at a unit cost of $94 per unit, and these units were sold to a list of approximately 200 to 300 people.

Q. And that list of subscribers included many employees of Bond and Share, employees and officers of affiliated companies, directors of the various companies and so forth, [18145] did it not?

A. I think that list did include many of those people.

Q. Are you able to tell us at this time whether the transactions on both sides, that is, as respects Electric Bond & Share subscription for the stock with Electric Power & Light on the one hand, and as respects Bond and Share's offering to allot subscriptions to this selected group of persons on the other hand, was on a 100 per cent cash basis, or was some arrangement made in either connection for partial payments?

A. I don't know offhand, but I am sure our records would indicate whether that was so or not, but I am not in a position to say at this moment.

Q. Will you advise us what the records indicate as to the time and manner in which Electric Bond and Share Company made payment to Electric Power & Light Corporation for the 120,000 shares of second preferred?

A. If that is your question I think I can answer it

Q. Please do.

A. The 120,000 shares of second preferred stock subscribed to by Electric Bond and Share Company, the amount due on such subscription was deducted from the amount of cash that Electric Bond and Share Company was to receive pursuant to the March 12, 1925 agreement.

[18146] I am sorry I didn't get your question clear.

Q. All right. That disposes of the question as far as Bond and Share and Electric Power & Light are concerned.

Now, in connection with the reoffer by Bond and Share to this list of subscribers to the second preferred stock plus the common stock and option warrant bonuses, was payment received by Bond and Share forthwith upon the subsciption for the full amount of $94 per block or was arrangement made in some cases for Bond and Share to carry these blocks when payment was made by the subscribers?

A. Again, I say I am not certain. My recollection is, however, that a substantial portion of it was paid in full shortly after the allotment.

However, I am not positive as to the length of time over which the balance of these subscriptions were paid.

Q. You will advise us as to the details concerning that, will you not?

A. I will.

Q. You stated that 110,520 blocks were disposed of through these subscriptions to a selected list. That left 9,480 shares of second preferred stock and 4,740 shares of common stock which was transferred, and 37,920 warrants which were closed out to the investment account of Electric Bond and Share Company?

A. Those amounts do represent the difference between [18147] 120,000 shares second preferred, 60,000 of common stock and 480,000 option warrants, and were transferred to the investment account where they still remain.

Q. Was that group of securities given a value of $891,120 in the investment account of Electric Bond and Share Company?

A. I think it is approximately $891,000 which is the 9,480 shares of second preferred stock at its cost $94 per share.

Q. Well, actually was not a specific value allocated to the second prefered stock, 9,480 shares in the amount of $854,904 and, $36,216 being specifically alloted to the 4,740 shares of common stock?

A. I am not able to answer your question specifically, Mr. Berman. However, I will refer to the records of the company and forward to you the information as it appears on the records.

Q. Now, Mr. Wiegers, I would like briefly to recapitulate with you the manner in which Electric Bond and Share Company acquired its common stockholdings in Electric Power & Light Corporation. We have already adverted to the fact that 310,000 shares of common stock of Electric were received by Bond and Share as part consideration for the transfer of the basket of securities by Bond and Share to Electric in 1925?

[18148] A. That is correct.

Q. Now, you have referred to the fact that a portion of that 310,000 shares was utilized by Bond and Share in connection with various offerings of preferred stock that were made by Bonbright and by Bond and Share in 1925.

A. That is, both preferred and second preferred.

Q. Yes. Now, what amount remained to Bond and Share of that 310,000-share block after allocating to Bonbright and to Bond and Share's preferred stock accounts, the portion of the common stock which was to go out with those securities?

A. The total number of shares originally acquired were 310,000 of which 200,000 were used in connection with the allotment certificates issued by Electric Power & Light Company and 55,260 shares disposed of with the sale of the second preferred stock. The total being 255,260 deducted from the 310,000 shares originally acquired leaves a remainder of 54,740 shares of common stock.

Q. And how were those securities carried in the investment account of Electric Bond and Share Company, that is to say, at what cost or value?

A. My recollection is it was a rather nominal book value.

Q. $1.00, wasn't it?

A. It might have been. My recollection is it was quite [18149] nominal.

Q. Now, in addition to that 310,000 shares of common acquired in connection with the transfer of the basket of securities, Bond and Share received a certain number of shares of Electric Power & Light common by virtue of its ownership of securities of Utah Securities Corporation which were involved in the exchange for Electric Power & Light common?

A. That is correct. Pursuant to the plan of reorganization of Utah Securities Corporation the common stockholders of that company were offered in exchange for the assets of that company, common stock of Electric Power & Light Corporation on the basis of four shares of common stock of Electric Power & Light Corporation plus $10 in cash, for each share of Utah Securities Corporation.

The Electric Bond and Share Company as the owner of 56,193 shares of Utah Securities Corporation common stock received in exchange for such holdings 224,772 shares of Electric Power & Light Corporation common stock plus $561,930 in cash, leaving a remaining book value applicable to the shares of Electric Power & Light Corporation common stock of $58,440.72.

Q. Now, included in the book value of $58,440.72 is some $8,150 of reappraisal made in the investment accounts

of Utah Securities Corporation prior to the transfer. Is [18150] that correct?

A. That is correct, approximately.

Q. And also included in the ledger figure or ledger carrying value of this block of Electric Power & Light common was some $2,247 representing the cost of tax stamps applicable to the exchange. Is that not so?

A. That is correct, yes, sir.

Q. Now, is it not true that in addition to the 224,772 shares of common acquired as you have related, through the exchange of the Utah Securities stock, and the 54,740 shares of common remaining with Bond and Share out of the 310,000 shares acquired as partial consideration for the securities basket transfer, Bond and Share acquired an additional 19,534 shares of common stock through various purchases of allotment certificates for preferred stock, which preferred stock was later sold, Bond and Share thereby recovering its full cost as leaving it with the 19,534 shares of common without cost?

A. Yes, that is approximately correct.

Q. Now, if we total the three blocks of common stock referred to, namely, the 54,740 remaining out of the 310,000 shares of common, the 224,772 received for Utah Securities common and the 19,534 shares acquired in connection with these particular stock transactions, what is the total?

A. 299,046 shares.

[18151] Q. Now, is it a fact that out of that total Electric Bond and Share Company disposed of 705 shares of common stock by a transfer to Charles Hayden, one of its directors, for "services"?

A. That is correct.

Q. No credit entry, however, was made to the investment account of Bond and Share for that 705 shares which went out to Hayden?

A. No dollar entry was made, merely the removal of 705 shares.

Q. Do the records of Bond and Share indicate any details as to the nature of the services performed by Mr. Hayden for which the 705 shares were delivered?

A. I have seen no details as to services rendered. However, the record indicates certain services were renderd by the firm of Hayden & Stone in connection with the Electric Power & Light situation, for which there was an agreement as to a participation in these securities.

Q. Now, deducting that 705 shares from the total previously noted, we find that Electric Bond and Share at that point emerged with 298,341 shares of common stock, did it not?

A. That is correct.

Q. And is it true that on the ledger of Electric Bond and Share Company those shares were carried at $94,-657.72?

[18152] A. That is after including this amount of the allocation of the grouping of the second preferred stock and common stock of some $34,000.

Q. Yes.

A. That is approximately correct.

Q. Of course, that $94,657 carrying value does not give effect to the approximately $4,700,000 profit which Electric Bond and Share Company realized in cash on the sale of the basket of securities to Electric Power & Light Corporation, concerning which we have already spoken. Isn't that right?

A. My recollection is that the profit as shown by the books of the company was approximately $4,200,000.

Q. We will leave the precise amount subject to the precise figures you are to furnish us.

A. That is why I indicated it was approximate.

Q. And particularly since we know that two of the figures as shown by the books of Bond and Share Company, certain adjustments must be made or allowed for in connection with reappraisals or other credits?

A. That is correct.

Q. Whether the figure be $4,200,000 as you recollect it, or $4,700,000 as I have suggested, the fact is that the carrying value of the common stock in the amount earlier indicated [18153] does not give effect in any way to that profit realized in cash, does it?

A. That is correct. I, at this point, would like to correct myself on my rough calculation. It is approximately four million six.

Q. Well, let's leave it subject to the final determination as shown by your figures.

A. Thank you.

Q. Now, Mr. Wiegers, in considering the precise amount of Bond and Share's profit realized on the sale of the basket of securities, the records of Bond and Share do not give effect, do they, to the $350,000 excess over cost realized by Electric Bond and Share Company in connection with the redemption of the notes of Dallas Railway & Terminal Company in 1926?

A. That is correct.

Q. It is correct that they do not?

A. This $4,600,000-figure does not take that difference into account.

Q. Does that figure take into account a profit realized by Electric Bond and Share Company in connection with the redemption of the collateral notes of Power Securities Corporation in the amount $36,107, concerning which you testified at page 12428 of the transcript?

[18154] A. That is correct. This indicated profit of approximately $4,600,000 represents the difference between the cash consideration plus the release in connection with the Utah service fees, and the remaining cost of the securities turned over to Electric Power & Light Corporation upon its formation and did not take into account any transactions in securities of those companies that were not involved in this turnover.

Q. And similarly that sum would not involve any profits realized by Electric Bond and Share Company through the fees it had received from the companies whose

securities were being transferred in that basket during the intervening years, nor the interest or dividends received by Bond and Share Company during the period of its ownership of those securities?

A. That is wholly correct, Mr. Berman.

April 9, 1941

HOWARD L. ALLER, President of American Power & Light Company.

CROSS-EXAMINATION

[9771] MR. BERMAN: At this time I should like to turn to a discussion of the activities of American Power & Light Company in connection with the Nebraska Power Company.

By MR. BERMAN:

Q. It is a fact, is it not, Mr. Aller, that in 1917 Electric Bond and Share Company held 33,654 shares of common stock of Omaha Electric Light & Power Company, and 4,242 shares of preferred stock of that company?

THE WITNESS: What was the first number of shares?

(The question was read by the reporter.)

THE WITNESS: Yes, sir.

By MR. BERMAN:

Q. Now certain of that common stock Electric Bond and Share Company had held since its organization in 1905, but the bulk of it was acquired by it early in 1917, isn't that a fact?

A. 9,127 shares had been acquired between 1905 and 1917, and some 24,527 shares of common stock and the 4,242 shares of preferred stock were acquired in 1917.

Q. Are you able to tell us at this time what the cost of those securities was to Electric Bond and Share Company?

MR. CALKINS: Isn't that a question for Mr. Wiegers, unless Mr. Aller has the information?

MR. BERMAN: I asked if he was able to tell us.

MR. CALKINS: Have you got that information yourself?

[9772] THE WITNESS: Is this on the record?

MR. CALKINS: Yes.

THE WITNESS: I am not able to testify from the Electric Bond and Share Company's records with certainty, of course, but we have some memoranda here which will indicate to Mr. Berman—which will probably be sufficient for his purposes—what the cost to Electric Bond and Share Company was.

By MR. BERMAN:

Q. Well, let me put the question in this way: Is it not a fact that these securities were carried on the books of Electric Bond and Share Company at the sum of $5,234,158; that their actual cost to Electric Bond and Share Company was $4,633,047?

A. We have not information with respect to the amount that Electric Bond and Share Company carried this investment on its books at, but we have figures here that would indicate to us that the cost to Electric Bond and Share Company was approximately the amount that you have stated, namely, $4,633,047.

Q. Well, suppose we assume that figure for present purposes, subject to check with Mr. Wiegers in the course of his testimony.

A. Which figure do you want to assume—both the Bond and Share figure of the amount on its books and the figure that I have stated?

[9773] Q. Suppose we assume a $4,633,000 figure, which you have indicated as the cost of the securities to Electric Bond and Share Company.

Now Electric Bond and Share Company in 1917 formed the Nebraska Power Company, did it not?

A. Yes, Electric Bond and Share Company was instrumental in the organization of the Nebraska Power Company.

Q. And about that time did Electric Bond and Share Company also convey to American Power & Light Company the securities it owned of the Omaha Electric Light & Power Company?

THE WITNESS: I guess you better read me that question.

(The question was read by the reporter.)

THE WITNESS: No, sir. The Electric Bond and Share Company conveyed the properties of the Omaha Electric Light & Power Company to the Nebraska Power Company, and the Nebraska Power Company issued its securities to the Electric Bond and Share Company.

By MR. BERMAN:

Q. And then did American Power & Light Company acquire those securities from Electric Bond and Share Company?

A. Yes.

Q. Will you tell us what American Power & Light Company gave to Electric Bond and Share Company in payment for the securities received by it of Nebraska Power & Light Company?

[9774] A. A 6 percent note in the principal amount of $5,239,108; common stock of American, $500,000 par value; $93,500 par value of 7 percent preferred stock of American, and cash in the amount of $33,336.33.

Q. Making a total principal amount of notes, par value of securities and cash paid of how much?

A. The total amount of such principal amount, par value and cash was $5,865,944.33.

Q. That sum was approximately $1,230,000 more than the cost of those securities to Electric Bond and Share Company, was it not—the cost of the Nebraska securities to the Electric Bond and Share Company?

A. That is correct, and there was very good reason therefor. The Electric Bond and Share Company having acquired these securities in part, over a period of many years past—that is, over a period of some 12 years prior to this 1917 date—and Electric Bond and Share Company having at that time less than 16 percent of the outstanding stock of American Power & Light Company, and being in a minority position, was quite properly charging American Power & Light Company for these stocks that it had acquired at a lower cost than the large volume of stocks that were acquired from the public in 1917, at a sale price to American of approximately the market price of such common stock in 1917.

[9775] THE WITNESS: Perhaps you better read it to me.

(The record was read by the reporter.)

By MR. BERMAN:

Q. As a matter of fact, Electric Bond and Share Company had re-valued its 9,127 shares of common stock, acquired prior to 1917, on its books to $140 a share, and that only made an upward adjustment of $365,080; isn't that so, Mr. Aller?

THE WITNESS: May I have that question again?

(The question was read by the reporter.)

THE WITNESS: I don't know what Electric Bond and Share Company did on its books.

By MR. BERMAN:

Q. Very well.

Now will you tell us what securities of Nebraska Power Company American Power & Light Company received for the securities issued by it to Electric Bond and Share Company, and the cash paid?

THE WITNESS: Will you read the last question, please?

(The question was read by the reporter.)

THE WITNESS: American Power & Light Company received $1,500,000 principal amount of 10-year, 5 percent notes; $3,000,000 par value of 7 percent preferred stock; $1,000,000 par value of second preferred stock, and $4,999,500 par value of common stock, making a total principal amount of par value [9776] of such securities $10,499,500.

MR. CALKINS: May we have a recess at this time?

THE EXAMINER: Yes.

(Whereupon, a short recess was taken, after which the hearing was resumed.)

MR. BERMAN: What was the last answer?

(The last answer was read by the reporter.)

By MR. BERMAN:

Q. Then the notes, preferred stock and second preferred stock of Nebraska Power Company received by American Power & Light Company approximately equalled the cost of the securities conveyed by American Power & Light Company, did they not?

A. The cost to American Power & Light Company was some $366,000 in excess of the par value and principal amount of the preferred stocks and notes of Nebraska Power Company. Of course, American Power & Light Company did not receive the par value and principal amount of the preferred and notes when they were ultimately sold.

Q. Have you included in your computation the second preferred stock of Nebraska received by American?

A. Yes.

Q. Isn't the total principal amount of second preferred and the notes $6,000,000?

A. $5,500,000, I figure it.

[9777] Q. Well, actually American received 3½ million dollars of preferred, $1,000,000 of second preferred, and 1½ million of notes, or a total of $6,000,000, did it not?

A. No, sir; it did not. It received $3,000,000 par value of preferred stock; $1,000,000 par value of second preferred stock, and $1,500,000 principal amount of notes, as I have stated previously.

Q. There was an amount of $500,000 of preferred stock held in trust for Nebraska in addition to the $3,000,000 of preferred received by American, was there not?

A. That is correct. That was treasury stock, as I understand it.

Q. So that, excluding that $500,000 of preferred, the par value of face amount of the securities received was some $300,000 less than the cost to American of the securities issued by it and the cash paid; and including the $500,000 the amount would be some $200,000 more, would it not?

A. Of course, American didn't get it. It is a little odd to compare something that American didn't receive with American's cost of the securities.

Q. Is it not a fact, as shown by Commission's Exhibit 144, that during the year 1917, the market value of American Power & Light Company's preferred stock ranged between a low of $70 a share and a high of $91, and its com-

mon stock between [9778] a low of $42 a share and a high of $86?

A. That is what that exhibit shows.

Q. American Power & Light Company, however, in entering the cost of the investment in Nebraska Power Company on its books, computed the securities issued by it at their par value, did it not?

A. They so did enter the securities issued at that time on their books at the par value of the securities so issued.

Q. And the cost at which they entered these securities also included the profit of some $1,232,000 realized by Electric Bond and Share Company, did it not?

A. Well, the items we are talking about, some $500,000 par value of common stock and only some $93,500 par value of preferred stock of American Power & Light Company issued—and I can't see how the difference between the par value of stocks issued and the market price of such stocks at any specific time could have equalled $1,232,000, whatever the $1,232,000 may be said to represent.

Q. I think you misunderstood the nature of my question. With respect to the securities issued by American Power & Light Company in addition to the preferred stock and the common stock issued by it, there were $5,239,108 principal amount of notes?

A. That is correct.

Q. And was American Power & Light Company at this time [9779] able to sell its notes on the market at their face amount, or was it not selling them at a discount?

A. The $5,239,108 principal amount of notes of American were not sold on the market, and no attempt was made to sell them.

Q. I understand that, sir; but I mean when American did issue notes or debentures, did they not always sell them at a discount?

A. I can't tell you as to whether all such notes were always sold at a discount, but these particular notes that

we are talking about were paid off in cash. There would be no discount considered in connection with them.

Q. I understand that, but—well, for example, when was the last issue of debentures issued by American Power & Light Company? There was an issue in 1916, was there not?

A. Your question was the last issue?

Q. The last issue of debentures preceding the year 1917.

A. There was an issue of 100-year debentures in 1916, which was the last sale to the public of any long-term bonds of American prior to this transaction in 1917. These notes that we have been discussing here are not of the same character at all.

Q. These debentures included a convertible feature permitting the holders to convert them into common stock at a [9780] certain ratio?

A. I don't so understand, sir. No, sir; there was no conversion privilege on these debentures that I know of.

Q. Which was the issue of debentures, part of which had been purchased by Electric Bond and Share Company, under which it converted into common stock in 1924, I believe?

A. I think you are referring to an issue of debentures with which warrants were issued, and the warrants could be converted into common stock of American Power & Light Company, the debentures being employed for payment of the purchase price of the stock.

Q. And that was the issue of 1916 which we have discussed a moment ago, was it not?

A. That is correct.

Q. Now, was American Power & Light Company able to market those debentures at par, even accompanied by those warrants for conversion into common stock?

A. These were 100-year debentures, and were offered to the stockholders of the company in 1916.

Q. At what price?

A. Subscribed by the stockholders.

Q. At what price?

A. At 93.

Q. That was the amount received by the company?

[9781] A. That is correct.

Q. Now in 1914, the company had issued $3,000,000 of 6 percent notes, one-year notes, to the Bankers Trust Company. Those were issued at a discount, were they not?

A. Yes. That was some several years prior to this period.

Q. And the one-year notes were issued in 1914, were they not?

A. Yes, one-year notes were issued in 1914, which was some 3 years prior to the time that we have been discussing.

Q. In 1916, some 7 percent, one-year notes were issued in the face amount of $2,500,000. They, too, were issued at a discount, were they not?

A. The one-year notes were sold in 1916 at practically par. There were $2,500,000 principal amount of the notes sold for $2,496,481.50, the difference probably being the cost of printing and other expenses incident to the sale.

Q. Isn't it a fact, as shown by Commission's Exhibit 135, the securities-issued exhibit of American Power & Light Company, that at no time, either prior to 1917 or subsequent to 1917, had American Power & Light Company issued either notes or debentures except at a discount from their face amount?

A. In the first place, one year following the transaction that we have been discussing, $2,500,000 of notes were issued at such a small amount below the principal amount of such notes [9782] that it constituted less than 1/10 of 1 percent difference.

Q. That is the issue you spoke of a short time ago?

A. Yes. That was the closest issue of notes to the date of the transaction we are now discussing in Nebraska, and these were sold to the Bankers Trust Company.

Q. Those were the 7 percent, one-year gold notes, were they not?

A. Those were 7 percent, one-year gold notes.

Q. The notes issued in connection with the Nebraska situation were 5 percent notes, were they not?

A. The notes that we have been discussing in Nebraska were of quite different character. They were 6 percent notes, and they were demand notes which were paid out in cash.

Q. Well, the notes of the Bankers Trust Company were paid off with cash, weren't they?

A. Yes, but they were one-year term notes.

Q. I mean, usually notes are paid off with cash, aren't they?

A. The notes that you have been referring to were paid off in cash in both cases. In one case the notes were one-year term notes, and the notes issued in connection with the Nebraska situation were not such term notes; and just about this time there were—in 1917 there were notes of American sold without a discount. There was one of the Columbia Trust Company in [9783] December 1917, which was a term note for 90 days at 6 percent, and in 1918 there were renewals of such notes.

Q. Why are those notes not shown on the tabulation you furnished to us, which is in evidence as Commission's Exhibit 133?

A. In one case they were securities issued; in the other case they were notes to banks.

Q. What about the note issued to Bankers Trust Company? They are notes, aren't they, issued to a bank?

A. On the securities-issued statement, there were included term notes of one year or longer.

Q. I am glad to learn that fact.

Now in addition to issuing its securities, Nebraska Power Company also assumed bonds of the Omaha Company in the amount of $2,776,000, did they not?

[9784] A. That is correct.

Q. At what amount did Nebraska Power Company enter the properties received from Electric Bond & Share Company in its plant account?

A. The plant account of the Nebraska Power Company as of June 1, 1917, shows $13,500,000, and this amount is an amount which has been well established. The plant account built up from that figure today is an amount which is substantially less than the reconstruction cost of such plant property. The earnings from the earliest days of the Nebraska Company have well supported such values as represented in the plant account. The earnings for the first five years were about five and a half per cent on such plant account. For the next 14 years were some 10 per cent on such plant account, and for the last five years some 8 per cent on such plant account, and we have been offered a purchase price for the Omaha properties in an amount substantially in excess of the plant account.

Q. That is all very interesting, Mr. Aller, but I take it the figure I asked for was the sum of $13,500,000?

A. That is correct.

MR. BERMAN: I ask at this time that there be received in evidence a balance sheet of Nebraska Power Company as of June 1, 1917, the date the company started in existence, which balance sheet was supplied by the respondent.

[9785] MR. CALKINS: No objection.

THE EXAMINER: Admitted.

(The balance sheet referred to above received in evidence as Commission's Exhibit No. 261.)

By MR. BERMAN:

Q. Can you tell us at what physical properties entered by Nebraska Power Company in its plant account at the sum of $13,500,000 were on the books of Omaha Electric Light & Power Company immediately prior to the transfer to Nebraska Power Company?

A. We do not have the books or balance sheets of the Omaha Electric Company, and therefore the figures are not definitely available to us.

Q. Who has the books of the Omaha Electric Light & Power Company?

A. We do not know, sir.

Q. Who was the last one that had possession of those books?

A. I don't know that, sir.

Q. Have you never made any effort to ascertain what became of the books and records of the Omaha Light & Power Company?

A. I had no occasion to do so, sir.

Q. I ask you at this time to endeavor to produce the [9786] books of the Omaha Electric Light and Power Company.

MR. CALKINS: Is there some particular thing you want, Mr. Berman?

MR. BERMAN: The books which would show the amount at which the properties of the Omaha Electric Light & Power Company were carried in its accounts prior to their conveyance to the Nebraska Power Company, and also showing the amounts at which the investments of Omaha Electric Light & Power Company were carried on its books.

At this time I ask to have received in evidence a copy of the letter of transmittal of the revenue agent at Omaha, Nebraska, inclosing his report covering an examination of the records of the Nebraska Power Company, Omaha, Nebraska, and other companies, for the years 1917 and 1920, as certified to by the Treasury Department at Washington, showing at page 5, that the plant account of Omaha Electric Light & Power Company immediately prior to its reorganization as the Nebraska Power Company, was stated at the amount of $6,883,896.37, or $6,616,103.63 less than the figure on which this plant was placed on the books of Nebraska.

(Commission's Exhibit 262, number marked for identification.)

MR. CALKINS: Same general objection as to similar reports introduced yesterday.

THE EXAMINER: Objection overruled. Admitted.

[9787] (The letter of transmittal referred to above received in evidence as Commission Exhibit 262.)

THE WITNESS: It might be of interest here, Mr. Berman, to point out that the plant account on the opening balance sheet of the Nebraska Company reflected the $500,000 par value of treasury stock which was subsequently canceled and the plant account reduced in like amount.

By MR. BERMAN:

Q. Now, there is shown on the balance sheet of Nebraska Power Company as of June 1, 1917, an item of $531,000 for securities of other companies. Will you kindly tell us what securities?

A. The Nebraska Power Company on the securities of a subsidiary, the Citizens Gas & Electric Company, and this item is in that connection.

Q. Is that the only item included?

A. I so understand.

Q. Will you tell us at what amount the stock of this Citizens Gas & Electric Company was on the books of Omaha Electric Light & Power Company immediately prior to the reorganization of that company into Nebraska Power Company?

A. I can't tell you that, sir.

Q. By reference to Commission's Exhibit 262, do you not note that the revenue agent had established that this stock was on the books of Omaha Electric Light & Power Company at [9788] the sum of $110,593.95.

THE WITNESS: Will you please read that last question back?

(Question read.)

THE WITNESS: I don't know as the revenue agent has made any definite establishment of that figure. The revenue agent has stated here that the records of the Council Bluffs Company were not available and the records of the Citizens Gas & Electric Company, prior to December, 1903, could not be located, and he further stated that the purchase of the stock of the Citizens Gas & Electric Company by Omaha Light & Power Company is shown on the exhibit. Now, he further states that this exhibit shows that the Omaha Company paid $110,593.95 for 2,495 shares of the stock of the Citizens Gas & Electric Company, and that all stock issued since that time has been through the means of stock dividends; and then there was an Exhibit No. 34 somewhere referred to that does not appear to be contained in these papers which you have handed me, so I can't tell you what he has established.

By MR. BERMAN:

Q. But you see that he lists under Omaha Electric Light & Power Company the stock of the Citizens Gas & Electric Company at the sum of $110,593.95, do you not?

A. Yes, but that is not the exhibit apparently that he referred to.

[9789] Q. But is is the exhibit that I am referring to, is it not?

A. Yes, but from your exhibit I cannot determine that he has definitely established that to be a fact.

Q. Lest you did not understand my previous request, I want to make it clear that if you are unable to locate the books of the Omaha Electric Light & Power Company to produce the information I requested, I wish you to bring in whatever books, information and memoranda in your files of these affiliated companies, which will indicate at what figures the plant and investment were carried by Omaha Electric Light & Power Company.

A. All right, sir.

THE EXAMINER: We will adjourn until 2:00 o'clock p. m.

(Whereupon, at 12:00 o'clock, noon, a recess was taken untill 2:00 o'clock p. m. of the same day.)

AFTERNOON SESSION

[9790] (Pursuant to the adjournment for the noon recess, the hearing was resumed at 2:00 o'clock p. m.)

THE EXAMINER: The hearing will resume.

Whereupon,

H. L. ALLER

resumed the witness stand, was further examined and testified as follows:

CROSS-EXAMINATION (continued)

By MR. BERMAN:

Q. The 10,000 shares of second preferred stock of Nebraska Power Company received by American Power & Light Company was convertible shares, were they not?

A. So I understand.

Q. They were convertible into first preferred stock?

A. Were convertible into preferred stock.

Q. Can you give us the provision for conversion of that stock in brief?

MR. CALKINS: I have a copy of these provisions, Mr. Berman, if you wish to see them.

MR. BERMAN: Yes, I would.

MR. CALKINS: I hand you Section 5 of the Nebraska Power Company by-laws, showing the provisions in effect from 1917 to 1925, and an amendment

in April, 1925, which was in effect until February, 1926.

[9791] MR. BERMAN: I ask that this provision of the By-Laws and the Amendment thereto be received in evidence as Commission's Exhibit 263-A and B.

MR. CALKINS: No objection.

THE EXAMINER: Admitted.

(The provision and amendment thereto referred to above were received in evidence as Commission's Exhibit 263.)

By MR. BERMAN:

Q. Subsequent to the receipt of the notes of Nebraska Power Company, its preferred and second preferred stocks in 1917, did American Power & Light Company sell the notes and the preferred and convert the second preferred into preferred and sell that to the public as well?

A. The preferred stock was sold to the public. The second preferred stock was converted to preferred stock and between 1917 and some time in 1923, the preferred stock into which the second preferred stock was converted was sold to the public. The notes were not sold to the public, but were redeemed by the Nebraska Power Company.

Q. When were those notes redeemed?

A. In June, 1919, and September, 1922.

Q. $400,000 in June, 1919, and $1,100,000 in September, 1922?

A. That is correct.

[9792] Q. When was the preferred stock originally received by American and sold to the public?

A. 29,000 of these shares of preferred stock were sold in June, 1917. It would appear that it may be necessary for us to get further information on that point.

Q. When were the balance sold?

A. I have not got the date for the balance, nor am I

absolutely certain as to the number of shares sold in June, 1917.

Q. Will you kindly provide us with a schedule showing the dates of the sale of each of all of this preferred stock and the amounts realized upon its sale?

A. Yes, sir.

Q. Will you also indicate on that schedule the amount paid to Electric Bond and Share Company as commission in connection with each of such sales, if any were paid?

A. Yes, sir.

Q. Now, will you tell us the total amount realized by American Power & Light Company on the sale of the preferred stock and the second preferred stock which were converted into preferred stock and then sold?

A. $3,594,570.86.

Q. Then you received the face amount of the notes at the time of their redemption, or $1,500,000, did you not?

A. That is correct.

[9793] Q. What was the total of the two items?

A. $5,094,570.86.

Q. And how much did that leave as applicable to American Power & Light Company's investment in Nebraska Power Company?

A. $800,585.99.

Q. Was that sum not reduced by further realizations of some kind?

A. No, sir.

Q. What shares of Nebraska Power Company does American Power & Light Company own at the present time?

A. 965,991 shares.

Q. And at what figure are they carried at the present time?

A. $809,110.43.

Q. Is it not a fact that the system cost of these shares is minus $423,786.48, and by "system cost", I mean the cost to the company first acquiring them with inter-company profits eliminated?

A. Of course, I am not in a position to testify with any degree of accuracy as to Electric Bond and Share Company's cost or as to any one else in the system other than American Power & Light Company and its own subsidiaries, but my information is that it would be indicated that Electric Bond and Share Company had sold stock to American Power & Light [9794] Company at less than its market price and had realized nothing from the transaction, and that there would be an equivalent amount of proceeds from the sale of securities which were in excess of the cost of such securities.

Q. Is it not a fact that American Power & Light Company in the U-5-S statement filed by it with this Commission states that the original system cost of these shares is the sum of minus $423,786.48?

A. We have not the U-5-S statement here, sir; so I cannot see what is in the U-5-S statement.

Q. Very well. I will have it brought up. Is it not a fact that subsequent to the 1917 transaction in which American acquired these shares from Nebraska Power Company that American never subscribed for an additional dollar of common stock of Nebraska Power Company?

A. American did not subscribe for any new issues of common stock subsequent to the original issue.

Q. Is it a fact that subsequent to American's acquisition of that common stock, Nebraska Power & Light Company sold large amounts of bonds and preferred stock to the public?

A. That is correct.

Q. Can you tell us the amount of Nebraska Power Company's funded debt at the present time?

[9795] A. $16,500,000 principal amount of first mortgage bonds and $3,500,000 principal amount of debenture bonds.

Q. What amount of preferred stock is outstanding in the hands of the public?

A. There are 22,561 shares of 6 per cent preferred

stock and 51,962 shares of 7 per cent preferred stock as of December 31, 1939.

Q. Or a total stated value of preferred stock aggregating what amount?

A. $7,452,300 par value of preferred stock.

Q. Is it not a fact that on this investment which stands on the American's books at some $809,000, and which has a system cost of $423,786 less than nothing, that American Power & Light Company has received dividends totalling approximately $19,000,000?

A. During the past 23 years, American Power & Light Company has received approximately the amount of dividends that you mentioned on the common stock owned by American.

Q. At this time I show you Item 9 of the U-5-S statement for 1939 of the American Power & Light Company which is in evidence in this proceeding as Commission's Exhibit 18-A, and tell me whether it is not a fact that American Power & Light Company has stated the cost to the system company originally acquiring the securities of Nebraska Power & Light [9796] Company at minus $423,786.48?

A. The footnote on this figure that you have mentioned is as follows: "Notes, preferred, second preferred and common stocks of this company were acquired as a group by the registrant for a consideration of $5,239,108 in cash, $93,500 par value of the registrant's preferred stock, and $500,000 par value of registrant's common stock. The amount reported in Column (G) is the mathematical result of taking the cost of such group of securities to the system company originally acquiring it (such system company having acquired and held the securities of a predecessor company for a period of years) plus additional costs incurred by the registrant, and less the proceeds received by the registrant from the sale or redemption of the senior securities originally included in such group."

Q. The figure of approximately $19,000,000 I mentioned a few minutes ago as the dividends received by Amer-

ican Power & Light Company up to the end of 1940 does not include the total return to the system from securities of the Nebraska Power Company and its predecessors, does it?

A. No, sir.

April 16, 1941

HOWARD L. ALLER, President of American Power & Light Company.

CROSS-EXAMINATION

[9991] Q. Mr. Aller, Florida Power & Light Company was formed in 1925 by Electric Bond & Share Company, was it not?

A. Yes, sir. It was organized on December 28, 1925 by American Power & Light Company, however.

Q. Now, certain assets were conveyed to Florida Power & Light Company through an intermediary named Lucian B. De Buys, isn't that so?

A. Yes, sir.

Q. Will you tell us who Mr. De Buys was?

A. Mr. De Buys was an intermediary, just as all the other intermediaries employed for the transactions.

[9992] Q. We found his name as an intermediary in a number of transactions. Was he employed by Electric Bond & Share Company as one of its personnel?

A. He was not a regular employee of Electric Bond & Share Company. He was employed for this purpose.

Q. He made his office with Electric Bond & Share Company, did he not?

A. Not that I know of, sir.

Q. Well, where was he employed?

A. I have stated that he was employed as an intermediary in these transactions.

Q. Was he an attorney? Who was he?

A. I do not know whether he was an attorney or not. I do not know Mr. De Buys.

Q. Will you kindly inquire who Mr. De Buys was, whether in fact he did not have an office with Electric Bond & Share Company in New York and whether he received a salary from Electric Bond & Share Company, or what his mode of compensation was for acting in these matters?

A. Yes, sir.

Q. Now, when Florida Power & Light Company was organized, it issued to Mr. De Buys various of its securities did it not?

A. It did.

[9993] Q. Will you tell us the securties it issued?

A. Two and a half million shares of common stock; 76,410 shares of $7 preferred stock; 50,000 shares of second preferred stock and 60,000 shares of the common stock of Utilities Land Company, the latter being issued by the Utilities Land Company.

Q. All these securities were turned over by De Buys to American Power & Light Company, were they not?

A. That is correct.

Q. These shares were no-par value shares?

A. That is correct.

Q. Will you tell us what the stated value was on the books of Florida Power & Light Company?

A. The stated value of the Florida Power & Light Company, issued to De Buys and acquired by American from De Buys, was $42,841,000.

Q. Both the $7 preferred stock and the $7 second preferred stock had a liquidating value of $100 per share, did it not?

A. That is correct.

Q. Now, if $100 per share be attributed to the $7 preferred and the second preferred, will you tell us what was the residual stated value of the common stock?

A. I do not believe that it is proper to deduct a [9994] liquidating value for a portion of the securities thus received in a group, but if we deduct from the total of $42,841,000 the liquidating value of the preferred stocks, we would de-

duct $12,841,000 and the resulting figure, when $12,841,000 is deducted from $42,841,000, is $30,000,000.

Q. Now, when $30,000,000 is divided by two and a half million shares, what does that give as the amount per share?

A. $12 per share.

Q. In addition to securities issued by it, did not Florida Power & Light Company assume a bond issue of the Peninsula Power & Light Company, which had been formed by American Power & Light Company immediately prior to the formation of Florida Power & Light Company, and which had been merged into Florida Power & Light Company at the latter's inception?

A. No, sir. Not that I know of.

Q. Well, Florida Power & Light Company was a consolidation of the Peninsula Power & Light Company, and the Southern Utilities Company, was it not?

A. Yes, sir.

Q. And had not Peninsula Power & Light Company put out a bond issue of $30,000,000 immediately upon its formation?

[9995] A. No, sir. Not as I understand. The Florida Power & Light Company issued some bonds to De Buys and these bonds were not included in the statement of stocks that I gave you a little while ago as having been issued by the Florida Company, and the Utilities Land Company to De Buys.

Q. To whom did Florida Power & Light Company issue the $30,000,000 of bonds?

A. To De Buys.

Q. And when were these bonds issued by Florida Power & Light Company to De Buys?

A. On or about the time of the organization of the Florida Company, the bonds were authorized and issued. They were issued as of January 1, 1926.

Q. And is it not a fact that the issuance of these bonds by Florida was part of the consideration pursuant to which Florida Power & Light Company was formed and agreed to issue its securities to De Buys?

A. Correct.

Q. The $30,000,000 of bonds were immediately marketed by a syndicate and sold to the public, were they not?

A. Yes, sir.

Q. And the proceeds were then distributed by De Buys according to various agreements he had entered into with American Power & Light Company and the Peninsula Power & [9996] Light Company and others?

A. That is substantially correct.

Q. Now, is it a fact that the proceeds of the bond issue, after payment of all fees, etcetera, was $26,938,125?

MR. MACLANE: What was that figure?

THE WITNESS: $26,938,125.

By MR. BERMAN:

Q. Including accrued interest?

A. We have not a record showing the exact proceeds from the sale of the bonds, sir. It was not American Power & Light Company's transaction.

Q. Wasn't De Buys American Power & Light Company's intermediary?

A. De Buys was an intermediary in the transaction and received the bonds from Florida and agreed to sell them to the syndicate and, under an agreement with American, was to pay certain moneys to American, which American received.

Q. How much was the amount received by American from De Buys out of the proceeds of the bond issue?

A. The total amount received by American Power & Light Company was $13,763,101.57.

Q. Then is it accurate to say that, in connection with the formation of Florida Power & Light Company, American Power & Light Company received securities of Florida Power & [9997] Light Company, having a stated value on the books of Florida of $42,841,000, and in addition it received in cash $13,763,101 as part of the proceeds of the sale of Florida Power & Light Company's bond issue?

A. Yes, the stated value of the securities received and the cash received from De Buys were respectively $42,841,000 and $13,763,110.

Q. Or a total of $56,604,110?

A. The total of stated value of securities and cash was $56,604,101.

Q. In addition, American Power & Light Company received 60,000 shares of the common stock of Utilities Land Company, did it not?

A. That is correct.

Q. And what was the stated value of those securities on the books of Utilities Land Company?

A. $600,000.

Q. Now, will you tell us what had been the cost to American Power & Light Company of the securities and properties conveyed by it to De Buys and by De Buys to Florida Power & Light Company in exchange for which American received the securities of Florida Power & Light Company, that we have been discussing, and the cash from the bond issue?

A. The total cost to American of the securities and [9998] properties that went into the Florida Company, was $30,637,020.02.

MR. MACLANE: Will the reporter read that figure to me please.

(Whereupon the last figure, as above recorded, was read by the reporter.)

By MR. BERMAN:

Q. Are you able to furnish us with an itemization of that figure, not for the purposes of being read orally into the record, but to be used as an exhibit?

A. No, we cannot. I can give you the items verbally, making up this total.

Q. Well, it is a somewhat lengthy list, is it not?

A. Well, there are about a dozen items.

Q. Well, suppose you do give us that list?

A. The items of American's cost incident to this transaction were as follows:

Miami Electric Light & Power Company, and Miami Water Company, $8,959,469.04.

Southern Utilities Company, $6,901,577.85.

Miami Beach Company and Miami Railway Company, $2,744,420.55.

Daytona Public Service Company, $2,086,375.33.

Miami Gas Company, $1,600,985.95.

[9999] St. Johns Electric Company, $629,805.41.

Lakeland Gas Company, $403,281.78.

Oliver Ice Company, $401,797.37.

Ormond Supply Company, $136,289.54.

Miscellaneous purchases of property, $125,712.95.

Advances for construction through the Phoenix Utility Company, $6,159,013.59.

Other expenses in connection with the investigation of the Florida properties, $441,489.53.

And certain other miscellaneous expenses in the amount of $89,240.96 less various refunds in the amount of $42,-439.83, making a total of this last item $46,801.13 net, and a total cost of $30,637,020.02.

Q. Now, will you tell us what part of that investment cost represents issuance of securities by American Power & Light Company and what part represents cash or equivalent?

A. The total of securities issued in American's cost incident to the transaction amounted to $4,186,060.

Q. Was that preferred stock or preferred income stock?

A. It was preferred stock and debentures.

MR. MACLANE: Of American Power & Light Company?

THE WITNESS: Of American Power & Light Company.

[10000] By MR. BERMAN:

Q. How much represented the issuance of debentures?

A. $1,600,000.

Q. Leaving how much for the preferred stock?

A. Leaving $2,586,060 for the preferred stock.

Q. The preferred stock was taken on the books at par value, was it?

A. This was a non-par value stock at this time and American issued 28,734 shares at $90 a share.

Q. And took it on its books at $90?

A. And took it on its books at $90 a share.

Q. How about the debentures. Were they taken on the books at the principal amount?

A. Yes, sir.

Q. With no allowance for any discount?

A. There was no discount in the debentures and the preferred stocks were taken on at $90, and the market price of the preferred stocks at that time were as follows:

In 1924 the high was 92 and in 1925 the high was 98, and the low in those two years was 84, and the closing bid and asked in 1924 was 88 bid and 90 asked, and in 1925, was 95 bid and 97 asked.

Q. That was the same preferred stock as was issued in payment for these properties, was it, Mr. Aller?

[10001] A. Yes, sir.

Q. Now, is it not a fact that in this figure of thirty million six hundred-odd thousand dollars you have given us, as representing American's investment in Florida, there are included substantial items representing advances made by American Power & Light Company to various of the predecessor companies of Florida Power & Light Company, in order to enable those companies to pay dividends to American Power & Light Company, and also various amounts charged on the books of American Power & Light Company as theoretical interest on sums advanced either for construction or for the purchase of properties?

A. Advances in substantial amount were made by American Power & Light Company to certain of the predecessors of the Florida Power & Light Company, and I do not know of any theoretical charges for interest.

Interest was charged on advances, but it was not a theoretical charge.

Q. I ask you to verify the following figures:

Was not the sum of $2,343,000 advanced to Miami Electric Light & Power Company for dividends on 10,000 shares of capital stock owned by American Power & Light Company, which dividends were paid on December 31, 1924, June 1, 1925, September 1, 1925, December 15, 1925, and December 23, 1925.

[10002] Would you like me to give the entire list and then you check them during recess?

A. I will not be able to check during this noon recess, because I will not be with my organization this noon, but I will have a check for you, of course.

Q. Was not the sum of $12,000 advanced to Miami Water Company, in order to enable Miami Water Company to pay dividends to American Power & Light Company on 1000 shares of Miami Water Company's capital stock on December 28, 1925, and December 31, 1925, in the amount of $12,000, and was the sum of $44,237 not charged on the books of American Power & Light Company representing interest on sums advanced to Miami Electric Light & Power Company and Miami Water Company, making a total to those two companies of $2,399,237, which was included by American Power & Light Company in its over-all investment figure of $30,637,000?

Similarly, was not the amount of $3,897 charged as interest on advances made to Southern Utilities Company. $106,113 as interest on investments in Miami Beach Electric Company and the Miami Beach Railway Company.

The amount of $20,677 as interest on the investment in Daytona Public Service Company.

The amount of $54,640 representing cash advances to

Florida Power & Light Company (old) in order to enable that [10003] company to pay dividends of $54,640 in December 1925 to American Power & Light Company, and the sum of $84,758 representing interest on the advances to Florida Power & Light Company (old).

The amount of $290,500 advanced to St. Johns Electric Company to enable that company to pay divdends totaling $290,500 to American Power & Light Company in December 1925, the amount of $12,047 from the Oliver Ice Company as interest on the investment, the amount of $3,942 to the Ormond Supply Company, representing a balance charged to that company for interest after certain dividends were credited against the interest, making a total of the items recited of some $2,875,000, all of which was included in the cost of American's investment in the Florida situation.

Will you endeavor to have these amounts verified or corrected, Mr. Aller?

A. I will.

Q. Now, the dividends received by American Power & Light Company from these predecessors of Florida, during the period before they were conveyed to Florida Power & Light Company, were taken into the income account of American Power & Light Company and not credited against the cost of the investment, is that not so?

Suppose you verify that and advise us whether any of [10004] those dividends were credited against the cost of the investment or whether they were all taken into the income account?

A. I will do so. I find that $187,500 of dividends were taken into American Power & Light Company's income account.

Q. Suppose you furnish us with a schedule, showing all dividends received by American Power & Light Company from the predecessors of Florida Power & Light Company (new) and the disposition made on the books of American Power & Light Company of those amounts?

A. All right, sir.

Q. Will you tell us what amount Florida Power & Light Company placed on its books as representing the value of the securities and properties received from American Power & Light Company, which you have told us cost American Power & Light Company the sum of some $30,600,000?

A. $42,841,000.

Q. Are you sure of that figure, sir?

A. The figure that I have given you was the stated value of the securities received by American Power & Light Company from the Florida Power & Light Company, as shown on the books of the Florida Power & Light Company.

The total of the item on Florida's books included the [10005] item of bonds issued to De Buys, so the total figure on Florida's books was $72,841,000.

Q. Now, the only properties received by Florida Power & Light Company at its inception were those which came over through De Buys from American Power & Light Company, isn't that so?

A. That is correct.

Q. And in addition, Florida Power & Light Company received a certain amount of cash from De Buys out of the bond issue?

A. Yes, sir.

Q. How much did it receive?

A. $12,000,000 plus certain cash of the predecessor companies in the amount of some $896,000.

Q. The fact is that Florida Power & Light Company, on its opening balance sheet, showed its total assets at the sum of $80,435,790, did it not?

A. That is correct.

Q. Now, will you tell us how much was included in that sum as representing the value of plant and investments, all of which had been received, you have said, from American Power & Light Company?

A. The amount of plant and investments shown on the opening balance sheet of the Florida Power & Light Company, [10006] was $64,523,013.32.

There were other items received, such as accounts receivable, notes receivable, materials and supplies, et cetera, totaling some $2,800,000 in addition to the cash received.

Q. Now, in the plant investment account, there were included only the assets which had come from American Power & Light Company, isn't that so?

A. That is correct.

Q. And those were the ones which you have told us had a cost on American's books of some $30,600,000?

A. That is correct.

Q. And they were set up at $64,523,013, and others at, you say, some six or seven hundred dollars additional?

A. There were other assets received, including the cash received from De Buys. The cash received from De Buys was not included in the cost to American.

Q. I understand that, but, of the assets received from American Power & Light Company, were they all placed in the plant and investment account and included at that total of $64,523,000, or were some of them distributed to other accounts which should be added to the $64,523,000?

A. All of the plant investment and other investment of the Florida Company, received from American, were entered in the account, "Plant and Investment, Expenditure Requisitions," [10007] et cetera, and that is all that was received from American, except certain current assets against which there were certain current liabilities.

Q. Florida Power & Light Company took these assets on its books at a figure some $34,000,000 greater than they were on the books of American Power & Light Company, isn't that so?

A. Approximately so. Some $33,000,000, I believe.

Q. Now, will you tell us how much was included in that sum of $64,523,000, as representing investments, as distinguished from physical property?

A. That I can't tell you, sir.

Q. Can you tell me at what figure the plant and investment, entered on the books of Florida Power & Light Company at $64,523,000, was on the books of the predecessor companies of Florida Power & Light Company, immediately prior to the transfer to Florida Power & Light Company?

A. No, sir; we can't tell you.

MR. BERMAN: At this time, I ask that there be received in evidence a copy of a document filed by American Power & Light Company under date of October 13, 1928, with the United States Treasury Department, and supporting schedules, showing on schedule No. F-1 that the total amount [10008] at which the properties received by Florida Power & Light Company was on the books of the predecessor companies was $28,970,167.43, not including the Miami Water Company and that the total amount on the books of Miami Water Company for all its properties, prior to conveyance to Florida Power & Light Company, was $1,765,954.30, or a total for the two items of $30,736,121.

MR. MACLANE: Will you please read back that last statement?

(Whereupon the last statement as above recorded was read by the reporter.)

MR. BERMAN: Which figures, I understand this schedule establishes, are the gross property figures, without any deduction for the accumulated depreciation reserve.

MR. MACLANE: May I see the exhibit, please?

MR. BERMAN: Yes, sir.

(Discussion off the record.)

MR. MACLANE: I simply call attention to the fact that the first page of this exhibit, being a photostat

of a letter of American Power & Light Company to the Commissioner of Internal Revenue, referring to this schedule F-1, states that "this schedule shows the property accounts of the company's predecessor the Florida Power & Light Company, Consumers Water Company, and St. Augustine Company, as of [10009] November 30, 1925."

It does not disclose the source of the information and that has to be left to conjecture. However, I am merely pointing that out in connection with the offer of the exhibit.

MR. BERMAN: Well, Judge MacLane does not dispute that this is a document filed by the American Power & Light Company itself?

MR. MACLANE: I am not objecting, I am not disputing it, I am simply saying that it seems to be a little ambiguous.

MR. BERMAN: I take it that, if the American Power & Light Company files a schedule and says this was the cost on the books of the predecessor companies, and so represents it to the income tax bureau of the United States Treasury, that we may accept it as a valid statement.

MR. MACLANE: I am not objecting to it, except that it does not state the facts it says it states. That is another thing we can argue, if we have to. I don't know that it is important to argue.

MR. BERMAN: It states that the total amount on the books of the predecessor companies, as of November 30, 1925—approximately a week, I believe, prior to the conveyance of these assets to Florida Power & Water Company—was the amount I have stated.

[10010] THE EXAMINER: The letter was written at that time?

MR. BERMAN: The letter is dated October 13, 1928, or three years later.

MR. MACLANE: What are we arguing about? I have made no objection. I just quoted from the first page of the letter, that is all; I made no objection.

THE EXAMINER: You offer it?

MR. BERMAN: Certainly. I ask that it be received.

THE EXAMINER: It is admitted.

(The document referred to was received in evidence as Commission's Exhibit No. 275.)

THE WITNESS: A short while ago, when you were discussing the difference between the plant and investment account of Florida Power & Light Company and the cost of certain securities and properties to American Power & Light Company, which were turned over to the Florida Company, you used a figure of some thirty-three or $34,000,000 as representing the difference.

I want to point out here that these computations do not include the items of cost to American Power & Light Company in the form of discounts and commissions and expenses incident to the sale of securities received by American from Florida, and that the excess of the Florida stated value of securities [10011] received by American and American's cost thereof, amounted to some $26,223,000.

By MR. BERMAN:

Q. Mr. Aller, what has the discount suffered by American in disposing of some of Florida's securities got to do with the difference between American's cost and the amount at which these securities were placed on the books of Florida?

On the books of American you have told us that these items had a cost value of some $30,600,000, and they were placed on the books of Florida at $64,500,000.

Now, why do you now bring in the question of the discount subsequently suffered by American Power & Light Company in selling some of Florida Power & Light Company securities?

A. These were some of the costs of American Power & Light Company not reflected in your formal computation.

MR. BERMAN: I get the idea, Mr. Aller.

THE EXAMINER: We will continue the discussion this afternoon. We will now recess until 2:00 o'clock.

(Whereupon, at 12:30 p.m., April 16, 1941, the hearing was recessed until 2:00 p.m., on the same day.)

[10012] AFTERNOON SESSION

Whereupon, at 2:00 p.m., April 16, 1941, the hearing was reconvened.

Whereupon,

H. L. ALLER

called as a witness on behalf of the Respondents, having been previously sworn, resumed the stand, was further examined and testified as follows:

CROSS-EXAMINATION (resumed)

By MR. BERMAN:

Q. Mr. Aller, I am advised that the total of the amounts shown by Commission's Exhibit No. 275 as the depreciation reserves of the predecessor companies of Florida Power & Light Company at the end of 1925, immediately prior to the transfer of these properties to Florida Power & Light Company, were some $2,308,423.

If that sum be deducted from the amount of $30,736,-112, shown as a book value on the books of the predecessors of all the properties conveyed to Florida Power & Light Company, does that not leave a net plant of $28,427,698?

A. The difference between $30,736,112 and $2,308,423 is $28,427,698.

However, I am not advised as to whether or not the figure of thirty million-odd dollars that I have just mentioned covers all of the properties which were conveyed to the [10013] Florida Power & Light Company, nor am I advised as to whether the amount of reserves on the books was the proper amount for such reserves or what such amount in reserve represented.

Q. Well, you do find on Commission's Exhibit No. 275, set forth over the signature of American Power & Light Company, the statement that the schedule shows the property accounts of the company's predecessor to Florida Power & Light Company, Utilities Land Company, Consumers Water Company and St. Augustine Company as of November 30, 1925, do you not, Mr. Aller?

A. Well, we find that in this statement, sir, but I still state that we have not had an opportunity to examine it to ascertain whether this contains all of the properties that were so turned over or not, or whether there were some properties omitted, such properties as those that were under construction or otherwise, that may have not appeared in those balance sheets.

Q. Then may we assume the correctness of these figures subject to your check and, on that assumption, is it a fact that the net plant and property of the predecessors of Florida Power & Light Company immediately prior to the transfer, was on the books of those companies at $26,427,-698?

A. The net plant and property would have to be defined [10014] as something which represented the difference between the plant account and certain reserves, to arrive at any such conclusion, and you have stated the total of plant

account and the total of reserves, which you find in this Exhibit of yours, and I have given you the difference between them.

Q. Now, is it a fact that, upon the formation of Florida Power & Light Company at the end of November 1925, immediately following the conveyance of these properties to Florida Power & Light Company, Florida Power & Light Company issued the $30,000,000 of bonds which we discussed earlier?

A. That is correct.

Q. And the fact then is, is it not, Mr. Aller, that these figures, as set forth in the statement filed by American Power & Light Company with the Internal Revenue Bureau, are correct, that Florida Power & Light Company issued $30,000,000 of bonds on a net plant of $28,427,698, immediately upon its inception, and sold those bonds to the public?

A. You will recall that Florida received some $12,000,000 in cash from the sale of those bonds, which $12,000,000 of cash was used to construct other property.

Q. Well, that scarcely in any way affects the situation with respect to the properties of Florida Power & Light Company on which these bonds were a lien. When Florida [10015] Power & Light Company put out this bond issue of $30,000,000 to the public, it had not yet received the proceeds of $12,000,000 so that the bonds were a lien only on that $28,427,000 of physical property and investments?

A. The value of these properties of the Florida Power & Light Company, as established in 1925 by the Florida Company, was sufficiently recognized by the bankers who purchased the bonds to establish that the properties at present and the value of those properties was sufficient to justify the issuance of the number of bonds which were issued.

Q. Now, respondents' Exhibit 148 is a copy of the circular which was used in the marketing of those bonds to the public, is it not, Mr. Aller?

A. That is correct.

Q. Will you kindly point to anything in that circular and in the annexed letter of Mr. S. R. Inch, setting forth

facts and circumstances concerning the Florida Company, which would in any way apprize the public to whom these bonds were being offered that these $30,000,000 of bonds were being issued against properties which had been on the books of the predecessors of Florida Power & Light Company at some twenty-eight and a half million dollars?

A. I will not take the time to read this circular [10016] here, which has been reproduced in very small form, but I am certain that these circulars issued in connection with the securities of the Florida Power & Light Company would not set forth the items of plant account which appeared on the books of certain predecessors, nor on the books of predecessors of predecessors.

Q. Nor did this circular in any way apprize the public that Florida Power & Light Company was issuing these bonds against properties which it had placed on its books at some $65,000,000, but which has cost the sponsors of Florida Power & Light Company, those who sold these properties of Florida Power & Light Company, less than $30,000,000.

A. No. If such a statement were made it would be improper, because the cost to American was in excess of $30,000,000 and the plant account of the Florida Power & Light Company reflected not only the values represented by American's cost, but also the plant account of the Florida Company contained elements which were off-set by many of the liabilities of the Florida Company, including the stock outstanding, issued in exchange for stock of the Southern Utilities Company directly to the public and not to American Power & Light Company, and many reserves and other liabilities totaling several millions of dollars, so that such a comparison, if made in a circular would have been an entirely [10017] improper comparison to make, and furthermore the circular would, of course, not have set forth the cost of certain properties to a predecessor or to predecessors of a predecessor.

These properties were acquired, some of them through trustees in bankruptcy and in other negotiations, and the

costs to the predecessor would not have much to do with the situation.

Q. Now, just to get the record straight once again, Mr. Aller, it is a fact that Florida Power & Light Company placed in its plant investment account at sixty-four million and some three hundred thousand, the assets received from American Power & Light Company, which had stood on the books of American Power & Light Company immediately prior to the transfer at some $30,000,000 isn't that so?

A. In the first place, the Florida Power & Light Company did not enter these assets on its books at $64,300,000 but at some $64,500,000, the actual figure being $64,021,-008.33.

In the next place, the cost to American Power & Light Company of these assets was $30,637,020 and the liabilities which appeared on the Florida Power & Light Company's books and were a part of the cost to the Florida Power & Light Company, although not a cost to American Power & Light Company, consisted of several million dollars of items appearing on the balance sheet of the Florida Company.

[10018] Q. But that has to do with the liabilities of Florida Power & Light Company and Florida Power & Light Company wasn't issuing these bonds against its liabilities; it was issuing them against its assets, and is it not a fact that the assets which Florida Power & Light Company had placed in its plant investment account at $64,500,000, approximately were those which appeared on the books of American at $30,678,000, approximately, the latter figure including in excess of $2,000,000, as enumerated by me earlier, for sums advanced for dividends received by American and theoretical interest charges?

A. Well, I did not check the figure of sums advanced that you have quoted, but irrespective of what, if anything that has to do with the situation, the answer to your question is no.

Q. Very well, sir.

MR. BERMAN: I ask that there be received at this time the balance sheet of Florida Power & Light Company as of December 28, 1925. Commission's Exhibit No. 276.

(The document referred to was marked for identification as Commission's Exhibit No. 276.)

THE EXAMINER: Admitted.

[10019] (The document referred to was received in evidence as Commission's Exhibit No. 276.)

MR. BERMAN: I also ask that there be received as Commission's Exhibit No. 276-A, the balance sheet of Utilities Land Company as of date of organization, December 7, 1925.

(The document referred to was marked for identification as Commission's Exhibit No. 276-A.)

THE EXAMINER: Admitted.

(The document referred to was received in evidence as Commission's Exhibit No. 276-A.)

By MR. BERMAN:

Q. Is it not a fact, Mr. Aller, that upon the receipt by American Power & Light Company of the $7 preferred stock of Florida Power & Light Company and the $7 second preferred stock, that American Power & Light Company commenced to sell to the public the $7 preferred stock and as rapidly as possible converted the second preferred into first preferred stock and sold that to the public in large measure?

A. In the first place, I do not know whether the [10020] second preferred stock was converted into first preferred stock as rapidly as was possible.

Preferred stocks were sold 1926 to 1932.

Q. Will you kindly furnish us with a tabulation showing the amount sold by or for American Power & Light Company each year from 1926 on?

When was the second preferred stock converted into preferred stock and how much remained unconverted?

A. 30,000 shares of the second preferred stock was converted into preferred stock in 1927 and 20,000 shares of this stock has not been so converted.

Q. Will you furnish us with an excerpt from the charter by-laws of the Florida Power & Light Company, setting forth the conversion feature of this second preferred stock?

A. Yes, sir.

Q. What was the total amount realized by American Power & Light Company, on disposition of the securities received from Florida Power & Light Company or De Buys, plus the cash received from De Buys in connection with the organization of Florida Power & Light Company?

A. The sum total of the cash received and the proceeds from the sale of securities received by American at the organization of Florida was $23,922,325.29.

Q. And if this had been deducted from the book amount [10021] of American Power & Light Company's investment in the Florida situation, how much does that leave as the amount attributable on the books of American to its investment in Florida?

A. $6,714,694.73.

Q. Then, of the original securities received, what part does American Power & Light Company still retain undisposed of?

A. It retains 20,000 shares of second preferred stock and the common stock of Florida Power & Light Company and the common stock of Utilities Land Company.

(Discussion off the record.)

By MR. BERMAN:

Q. When was the last of the preferred stock received by American Power & Light Company from Florida Power

& Light Company, or converted from the second preferred, disposed of by American Power & Light?

A. In 1932.

Q. Will you kindly furnish us with a schedule, setting forth the disposition of these securities in itemized forms, the amounts received and the amount of commission, if any, paid to Electric Bond & Share Company in connection with the disposition of any such securities?

A. Wasn't that covered in your former question?

Q. I don't think so.

[10022] (Discussion off the record.)

By MR. BERMAN:

Q. Now, will you also furnish us with a schedule showing the distribution by De Buys of the proceeds of the $30,000,000 bond issue?

You have so far indicated that certain amounts were received by American Power & Light Company and certain amounts by Florida Power & Light Company.

Will you show us the disposition of the remainder of the proceeds of that bond issue?

A. I will endeavor to do so.

Q. Included in American Power & Light Company's investment figure of $30,600,000 were also certain amounts paid to Phoenix Utility Company and Electric Bond & Share Company, were there not, Mr. Aller?

A. That is correct.

Q. Can you tell us how much those amounts were?

A. The amount which had been advanced to the Phoenix Utility Company for construction was $6,159,-013.59.

The amounts paid to Electric Bond & Share Company, I cannot determine at the present moment.

Q. Did that sum in excess of $6,000,000 paid to Phoenix not include fees to Phoenix over and above costs, in the amount of $225,774?

[10023] A. I know that construction fees were paid to Phoenix Utility Company in the amount of $225,744, but I do not know as to whether or not this was an amount in excess of their costs.

Q. Do you not know that these fees were paid over and above all costs of Phoenix, that the $6,000,000 figure included all the costs and expenses of Phoenix in connection with these operations and then a fee of $225,774 in addition?

A. I have stated that I did not know that to be the case at all, sir.

MR. MACLANE: Didn't I make a stipulation or some statement on that some weeks ago?

MR. BERMAN: Yes, Judge; I am satisfied with it, but Mr. Aller never has been. He has constantly disputed it.

THE WITNESS: I stated that I did not know that to be the case, sir, and I did not, and I do not.

By MR. BERMAN:

Q. Did not the investment cost of American Power & Light Company also include approximately $150,000 paid to Electric Bond & Share Company for "investigation expenses," in connection with the Florida situation?

A. I don't know just what you include in an item of $150,000. Payments were made to Electric Bond & Share [10024] Company and others, and charges incurred to reimburse it for expenses of investigating the Florida properties in the amount of some $148,000 and there were other expenses in connection with the investigation of some $45,000, but the latter were not to Electric Bond & Share Company.

Q. Did not the investment figures on the books of American also include the sum of $248,532 advanced to Mr. S. R. Inch, including interest thereon, in connection with his operations in Florida, but concerning which Amer-

ican Power & Light Company would furnish no details to the Federal Trade Commission?

A. That is a fact that American did advance some $248,000 to Mr. Inch in connection with his operations and expenses in Florida.

Q. Will you kindly furnish us with an itemization of that sum, so that we at least may see in what way that sum was expended?

A. I will endeavor to do so.

Q. Now, subsequent to the formation of Florida Power & Light Company, American Power & Light Company never purchased any additional common stock of Florida, is that not a fact?

A. That is correct.

Q. It did, however, purchase an issue of debentures [10025] of Florida Power & Light Company in 1927 in the amount of $22,000,000, did it not?

A. Yes. It purchased $22,000,000 of debentures and a substantial amount of preferred stock from the Florida Company.

Q. Is that the issue of $6 preferred stock?

A. Yes, it purchased some 10,000 shares of the $6 stock and also American purchased some 13,477 shares of $7 preferred stock.

Q. Now, that $7 preferred stock was purchased for issuance to the public and was sold to the public, was it not?

A. American still has this 13,477 shares of the $7 preferred stock and it also has the 10,000 shares of the $6 preferred stock.

Q. In connection with the acquisition of the debentures, or either of the issues of preferred stock you have mentioned, did American Power & Light Company pay any cash to Florida Power & Light Company, or were all those securities acquired in cancellation of open account indebtedness owed by Florida to American Power & Light Company?

A. American Power & Light Company paid the cash to Florida Power & Light Company, covering both of these issues of debentures and $6 preferred stock.

[10026] The cash was paid to the Florida Company and indebtedness incurred, and the indebtedness satisfied by the issuance of the securities with respect to the debentures, but the $6 preferred stock was purchased and paid for in cash in the amount of $940,000.

Q. Will you tell us how it was that American Power & Light Company came to purchase this preferred stock from Florida Power & Light Company for cash?

A. It was my understanding that Florida needed cash for its expansion and American purchased the stock from the Florida Company.

Q. Why did not American Power & Light Company purchase common stock from Florida, in order to provide it with needed capital?

A. I do not know the reasons why American purchased the preferred stock.

Q. When American Power & Light Company wished to assist Florida Power & Light Company in disposing of $22,000,000 of Florida Power & Light's floating debt, why did not American Power & Light Company accept common stock for that $22,000,000 instead of taking debentures?

A. The loans that American had outstanding were seven percent loans with Florida and American accepted six percent debentures at par in cancellation of those loans.

[10027] Just why American didn't take first mortgage bonds or common stock or preferred stock or something else, I cannot tell you.

Q. You mean American—

A. (Interposing) The facts are that American accepted $22,000,000 of debentures which were 6 percent debentures at that time.

Q. You mean American Power & Light Company had been charging Florida Power & Light Company 7 percent interest on the open account advances prior to that time?

A. The usual rate of interest, sir, I believe was 8 percent in Florida at that time or more.

Q. Was that also the usual rate of interest at No. 2 Rector Street, New York City?

A. No, the usual rate of interest was not 7 percent all over the United States, but it was the rate of interest charged in the Florida situation at that time.

MR. MACLANE: Let me get this clear, do you mean that American was charging 8 percent or 7 percent on the Florida loans?

THE WITNESS: Seven percent.

MR. MACLANE: And your statement as to the rate of interest related only to current or going rates of interest in Florida, is that right?

[10028] THE WITNESS: That is right.

MR. MACLANE: All right.

THE WITNESS: American did not charge any 8 percent interest in Florida, although 8 percent was the going rate in Florida for loans.

By MR. BERMAN:

Q. Florida's officers and directors were located at No. 2 Rector Street, New York, were they not, Mr. Aller, at that time?

A. Yes, sir, with certain exceptions.

Q. Who was the chairman of the board and who was the president?

A. Mr. Inch was the president of the Florida Power & Light Company and he was at that time in Florida all of the time.

Mr. Joe Gill was vice president of the company. He was located in Florida all of the time.

Q. Wasn't Mr. Inch a vice president of the Electric Bond & Share Company?

A. Yes, but he was located in Florida all of this time that we have been discussing.

Q. Who was chairman of the board, Mr. Aller?

A. I don't think there was any chairman of the board, sir. There was an executive committee, but there was no [10029] chairman, as far as I know.

Q. Well Mr. Mitchell was on the executive committee, was he not?

A. That is right, but he was not chairman of the board.

Q. Who was chairman of the board?

A. There was no chairman of the board.

Q. Are you ready to assume that Mr. Mitchell acted as chairman of the board?

A. No, sir. I think the president acted as the chairman of the meetings of the board, but there was no chairman of the board of directors.

Q. I thought you said the president was in Florida. Now the board meetings at that time were held in New York City, were they not?

A. I believe so. Some of them, if not all of them. I don't know whether all of them were or not.

MR. MACLANE: What time is this that Mr. Berman is referring to?

MR. BERMAN: 1925, 1926, 1927.

MR. MACLANE: Well, I have quite a distinct recollection of the minutes of board meetings held down in Miami, Florida. I may be wrong about it.

MR. BERMAN: Suppose you furnish us with a list of the [10030] board meetings which were held, as they appear in the minute books of Florida Power & Light Company, and the executive committee meetings which were held from 1925 to 1929 inclusive, and the locale of each such meeting as stated in those minutes.

Will you do that, please?

THE WITNESS: Yes, sir.

By MR. BERMAN:

Q. Now, American Power & Light Company has been receiving 6 percent on those debentures ever since 1927?

A. It has.

Q. It receives 6 percent on those debentures at the present time, doesn't it?

A. It does.

Q. How much does that give American Power & Light Company annually in the form of income?

A. $1,320,000.

Q. American Power & Light Company has never agreed to accept the debentures or securities bearing a lower rate of interest than that from Florida Power & Light Company?

A. These securities were issued to American Power and Light Company in 1926 and they are 25 year old debentures which will mature in 1951.

Q. How did it happen that American Power & Light [10031] Company did not sell those debentures as it was wont to sell its senior securities of the subsidiary companies?

A. I do not know why American did not sell them. The effects of the Florida depression in 1926 and '27 and the effect of the devastating hurricane in 1926 may have had something to do with the situation. Certainly it had a great deal to do with the growth of the Florida Power & Light Company from that time.

Q. The land boom in Florida collapsed about the end of 1926 or the beginning of 1927, did it not?

A. I think the first flutters of it were in the—the first flutters of the break occurred in the summer of 1926 and the crash in real estate values was very severe in the early months of 1927.

Q. So that is it not fair to say that the depression came to Florida some two years earlier than it did to most of the country?

A. Yes, at least two years earlier than the break in the stock market in 1929.

Q. Is it not a fact that the reason why American Power & Light Company was required to make open account advances to Florida Power & Light Company, which aggregated $22,000,000 by the end of 1926, and for which American accepted that issue of debentures, is that Florida Power & [10032] Light Company was never adequately financed at its inception?

A. No, I wouldn't say that is so, sir.

The Florida Power & Light Company was growing very rapidly. I have stated in my direct testimony that it took from a year to two years for the construction of property before this property was put in service and this construction was under way.

Because of the rapid rate of growth of the communities served by the Florida Power & Light Company in the year 1926 and '27, there was a sum total of $55,000,000 of cash spent for construction additions by the Florida Company.

The loans made to the Florida Company were a very substantial amount and the total of them was about $33,000,000 for this period of 1925 and 1926.

At the end of 1926, Florida Company owed $22,680,000 on such loans to American.

Q. And American cancelled $21,989,000 of open account indebtedness for that $22,000,000 of debentures, isn't that so?

A. It was not my understanding American cancelled $22,000,000 of indebtedness.

Q. But on this tabulation handed to me by your Staff it is indicated that the proceeds of the $22,000,000 of debentures received by American Power & Light was $21,989,000?

A. Well, there was some very small expense covering [10033] the taxes on the issuance of these securities in the

amount of $11,000, so that Florida's net proceeds were $21,-989,000. Florida bearing the taxes assessed against Florida.

Q. Do you not think that a company which was organized at the end of 1925, with the objective of engaging in extensive construction and expansion work, to the extent that it piles up indebtedness, within one year, of over $22,-000,000, was a company which was not properly financed at its inception for the work which it was intended to undertake?

A. I don't think that conclusion can be reached at all, sir. Florida was growing very rapidly and the earnings could only be realized after the property had been constructed.

A property that is growing at the rate of a hundred percent a year cannot finance, through the issuance of securities to the public, on estimated earnings, two years in advance, and I think that, under the circumstances with which the Florida Company was faced, and the rate of growth that it was experiencing, that it was quite properly financed at its inception.

Q. Of course, if the two and a half million shares of common stock issued by Florida Power & Light Company, which you have told us had a residual stated value on Florida's [10034] books of some $30,000,000, had represented actual cash invested in Florida instead of water, then Florida wouldn't have been in those financial difficulties and would not have piled up that tremendous amount of debt, isn't that a fact, Mr. Aller?

A. Well, I don't think it was represented by water, sir, and I, of course, will admit that if somebody had made a present to Florida of any number of millions of dollars, that it would have resulted in the reduction of the debt to Florida by that amount.

Q. Well, as a matter of fact, wasn't the entire investment, of course, of American Power & Light Company represented on Florida's books by the issuance of those $30,000,000 of bonds so that all the 78,410 shares of $7 pre-

ferred stock and the 50,000 shares of second preferred stock issued by Florida and received by American represented no value received by Florida whatever, and both the common and preferred was water?

A. That was not so at all, sir.

MR. BERMAN: Very well. I ask that there be received in evidence at this time the tabulation furnished me by the Respondents entitled, "Florida Power & Light Company, statement of all securities issued, retired or reacquired, December 28, 1925 to June 30, 1940."

[10035] (The document referred to was marked for identification as Commission's Exhibit No. 277.)

THE EXAMINER: Admitted.

(The document referred to was received in evidence as Commission's Exhibit No. 277.)

THE EXAMINER: Let us take a five minute recess.

(Whereupon a short recess was taken.)

August 1, 1941

JOE H. GILL, President of Electric Power & Light Corporation.

CROSS-EXAMINATION

[15051] Q. Mr. Gill, subsequent to the purchase of the securities from Southern Power & Light Company, Electric Power & Light Corporation made other purchases of securities and properties of companies which were to go into Arkansas Power & Light, Louisiana Power & Light, Mississippi Power & Light, and in addition it made loans and advances of one kind or another to the respective companies, and had other costs and expenses. At what figure do the

records of Electric Power & Light [15052] Corporation indicate the total costs, in connection with the companies and properties which came to form Arkansas, Louisiana and Mississippi, as of the time of the formation of those companies?

A. That is a difficult question to answer because, as we discussed before, it involves quite a number of transactions. I will answer it this way, in order to start:

As to the Arkansas Power & Light situation, the total of those costs were $22,940,965, plus the applicable part of the cost of the 36,993 shares of Southern Power & Light.

Now as to the Louisiana Power & Light, the comparable figure at the time of the turn-over to Louisiana Power & Light was $8,334,310, plus the applicable portion of the securities of Southern.

As to Mississippi Power & Light, it was $10,512,000, plus the approximately 21,000 shares of the Mississippi Power & Light which in turn are the proportionate part of the Southern Power & Light group applicable to Mississippi.

Q. When you refer to the applicable portion of the Southern Power & Light shares, you mean the applicable portion of the shares of Electric paid for the assets of Southern Power & Light?

A. Electric's book cost of the Southern Power & Light situation.

[15053] Q. You say in the case of Arkansas, it is the portion applicable to 36,933 shares?

A. 36,993.

Q. Shares of what?

A. Of the acquired stocks of Southern Power & Light group. We acquired 36,000—I am sorry, it is the applicable portion of the Southern Power & Light group to the 36,993 shares of Arkansas Light & Power, and just as in the Mississippi group, it is the applicable portion of the Southern Power & Light group to the 20,991 shares of the Mississippi Power & Light Company; and in the Louisiana group, it is the dollar figure stated plus the applicable portion of the

Southern Power & Light group to the acquired securities of the Louisiana companies in the Southern Power & Light group. To put it shortly, it is the sum of these figures plus the unallocated portion of the cost of Southern Power & Light.

Q. Well, Mr. Gill, it is possible, is it not, to reduce to a precise figure the allocable portion of the cost to each of the groups of Arkansas, Louisiana and Mississippi, by taking the amount at which these shares were in the investment account of Southern Power & Light, which we know, and then increasing them by the ratio between the difference at which the total group of securities was in the investment account of Southern, and the amount at which they came [15054] in the investment account of Electric. Your computations yesterday indicated that after giving effect to the debits and credits, that group of securities may be said to have come into the investment account of Electric at $9,760,250, as I recall?

A. I think that is the correct figure.

Q. And we had a break-down of those securities, as they were in the investment account of Southern, showing an aggregate as of April 1925, I think, of $6,250,000, or thereabouts, all allocated to the different securities. If we were to reduce the difference between the ledger value on Electric's books, and that on Southern's books, to a ratio, and add that ratio to each of the items as they were in the investment account of Southern, that would give us the allocable cost of each of those groups of securities which went to Arkansas, Louisiana and Mississippi, and would give an estimated cost for each of the companies, would it not?

A. Well, I think you could approach it that way; on the other hand, I can't ever say, even if we approach it that way, that that was the Electric Power & Light allocation.

Q. Well, there was no allocation—

A. (Interposing) There was no allocation by Electric Power & Light.

Q. But you would consider that a reasonable manner of [15055] approach, would you not?

A. If one wanted to use that form of approach, that would be a reasonable manner of approach.

Q. What is the total of the three groups of figures you have mentioned, without giving effect to the allocation of the Southern group?

A. I am dealing only in round hundreds. The sum of those three amounts would be $41,787,200.

Q. And that includes no part of the cost of the assets which came over from Southern Power & Light?

A. That is correct.

Q. So that to this figure must be added how much, Mr. Gill?

A. Well, if we are consistent in your approach, we would add the $9,767,200. That would give us about $51,550,000 by this approach.

Q. Is that the figure at which they are on the books of Electric, the three groups of securities?

A. I don't happen to have a compilation as of any particuler date, because these turn-over dates are different. These figures I have used are the figures which accrued to each of these situations at its turn-over date.

Q. Now—

A. (Interposing) Of course, the figures I have used [15056] are the figures taken from the investment record of Electric Power & Light Corporation.

Q. Would you supply us, Mr. Gill, with an itemization showing in detailed fashion the manner in which the figure of $22,940,000 was arrived at for Arkansas; $8,334,310 for Louisiana, and $10,512,000 for Mississippi?

A. Yes, I will make up compilations for you that lead to these figures as of the dates of the turn-over.

Now before we leave this, I would like to generally tie the over-all picture back again as I did on direct, in order that we won't apparently leave any hiatus or conflict in these figures.

You see my difficulty arises, Mr. Berman, in that you ask me to combine accounting figures at varying dates and

times, and it is always impossible to do that without misleading. To bring them all together to some point of time I would like to put in these over-all figures within which these figures moved, and that is to bring them to September 30, 1940, which is clear through, giving effect not only to the transactions leading up to the time of acquisition by each of these respective companies, but to the subsequent accounts, debits and credits, in the investment account of Electric Power & Light.

The gross total additions in the Electric Power & Light [15057] ledgers would be $60,191,183, and the proceeds and various credits which have been made total $43,576,757, less a credit for the removal of the Garland Power Development investment from this group of $200,000, leaving a net in this total group investment as of September 30, 1940, of $16,414,426.

Now my reason for doing that is a perfectly obvious one, that at the time of closing of these contracts, there were carried over liabilities which were subsequently discharged, and credits which were subsequently received, and it is always difficult in a moving transaction to take any disassociated periods of time and arrive at a figure that isn't in some minor detail, in the order of these kind of figures, possibly at any given time $150,000 to $200,000 out of account.

Now if you want these as of a particular date, all brought forward to some particular date, and I think you have to bring them to some particular date, then we can make the compilations to fit your desires, do you see?

Q. Let me ask you this, Mr. Gill:

$16,414,426 represents, as I take it, the present ledger value of Electric's investment in Arkansas, Louisiana and Mississippi?

A. That is correct, that is, as of September 30, 1940.

Q. And this represents not only the initial group investment, but all subsequent purchases and acquisitions of [15058] any kind applicable to these three companies, Arkansas, Louisiana and Mississippi?

A. Less the credits from disposition of elements or pieces of that investment in the period of time. You see, I gave you the gross over-all cost as booked, the gross over-all credits as booked, and the net book balance in the investment account remaining as of September 30, 1940.

Q. Now in these figures you gave me for Arkansas, Louisiana and Mississippi, separately, must effect be given to any dispositions which were later made before securities went into Arkansas, Louisiana and Mississippi, or can this be said actually to have been the cost of all items delivered by Electric to Arkansas, Louisiana and Mississippi, other than the applicable portion of the Southern Power & Light Company purchase?

A. The figures that I have given you are an attempt to place, to the items carried over in the case of Arkansas, for instance, under the Hatch agreement, to Arkansas Power & Light, the cost of those items on the books of Electric Power & Light involved in the turn-over, including, without assignment of value, the cost of the acquisition of the Arkansas Light & Power securities in the Southern transaction.

Both of us must recognize that there were debits and credits, shall I say, within the Hatch agreement, that flowed [15059] subsequent to the actual date of turn-over, but I tried to give effect to those as if they had occurred on the turn-over date.

Q. Now computing the cost on that basis, and adding to those the $9,767,200 representing the net cost to Electric of the securities acquired by Southern, which were conveyed to Arkansas, Louisiana and Mississippi, respectively, we get this total of $51,548,400?

A. $51,554,400.

Q. And you don't feel that we have duplicated in any way by adding to this $9,767,000, the segregated figures for each of these companies that you gave us above?

A. Not if I have read my notes correctly.

Q. These segregated figures, of course, include the loans and advances made to the predecessors of Arkansas,

Louisiana and Mississippi, and all costs of every nature, do they not?

A. They include the costs which were charged on the investment books of Electric Power & Light in connection with the situation.

Q. And they include the moneys advanced to these companies to discharge their underlying bonds preparatory to the issuance of new bonds upon the formation of the company; they include the advances made to these predecessor companies [15060] for all corporate purposes; and so forth, do they not?

A. Well, I think I might read the Arkansas items in, and then you would be able to see just what they do include.

First, without value, the 36,993 shares of Arkansas Light & Power Company common, coming over in the Southern Power & Light group; to which is added the cash cost of 913 shares of common and 1,946 shares of preferred of that company, subsequently acquired at a cost of $321,025.

Notes and loans to Arkansas Light & Power Company in the amount of $2,621,364.

The cost of purchasing 5 shares of The Pine Bluff Company preferred at $450.

The Arkansas Central Power & Light situation, including 149,990 shares of common capital stock; the Inter-City Terminal Railway Company—2,057 shares of common and $213,000 first mortgage bonds, and $1,000 principal amount of first mortgage bond of Little Rock Railway & Electric Company, which were purchased; and to which was given a credit of $145,900 for the Inter-City Terminal, not turned over; and $1,021 credit for the bond of Little Rock Railway & Electric, not turned over.

In my figures the Arkansas Central situation, so far as those elements are concerned, is taken in at $3,517,550.

Then, notes and loans accounts of the Arkansas Central [15061] Power Company, in the amount of $814,000.

Notes and loans of the Inter-City Terminal Company, and miscellaneous accounts receivable of the Inter-City Terminal Company, didn't go over.

East Arkansas Power & Light, common, at $64,000; loans at $206,000; and interest at $1,510.

Then the acquisitions that had been made by Frank A. Reid in this period at their cost—$977,550.

Q. At whose cost?

A. At the cost of acquisition to Frank Reid or to Electric Power & Light, for whom he was acting as nominee.

Consumers Ice & Light Company loans at their face—$73,000; Phoenix Utility loans for construction advances—$205,000, with interest at $1,214; advances to retire debt of Arkansas Light & Power Company, Arkansas Central Power Company, Pine Bluff Company, in the amount of $13,057,700.

The cash working capital paid in of $1,000,000.

And expenses in the amount of $80,416.

From the sum of these I derive a total of $22,940,965, plus whatever is allocable to the stock of the Arkansas Light & Power Company.

Q. Do you have an extra copy of that list at the present time, Mr. Gill?

A. No, I don't, and I would like, in any list I put in, [15062] to fix dates more definitely than they are fixed here on each of those transactions.

MR. FROMEN: May we have a recess for a few minutes at this time, Mr. Examiner?

THE EXAMINER: Yes, we will have a short recess.

(Whereupon, a short recess was taken, after which the hearing was resumed.)

THE EXAMINER: The hearing will resume.

By MR. BERMAN:

Q. Mr. Gill, what was the total price received by Electric Power & Light Corporation from Arkansas Power & Light, Louisiana Power & Light and Mississippi Power & Light for these assets which you have just enumerated?

A. Well, under date of October 8, 1926, Electric Power & Light accepted a proposal from L. Boyd Hatch, an intermediary, under which it is stated, among other things, that he would cause a company to be organized to be known as Arkansas Power & Light, and it would have an authorized capital stock of 150,000 shares of $7 preferred stock, and 100,000 shares of $6 preferred stock, and 1,300,000 shares of common, of which 96,400 shares would be presently issued and 1,000,000 shares of common stock.

He offered to deliver to Electric Power & Light 35,000 shares of the $7 preferred stock, 1,000,000 shares of the [15063] common stock, ignoring directors' shares, and cause that company to be free of debt except for current operating and contingent liabilities, and except for $18,000,000 of mortgage bonds and $1,700,000 principal amount of bonds of the Little Rock Railway & Electric Company, and $1,018,500 principal amount of the refunding bonds of the Little Rock Railway Company, and certain small real estate mortgages not named.

Q. Can't we simplify the process somewhat if, instead of your seeking to arrive at the price paid to Electric, you simply give us the price paid by each of the three companies for the assets that they acquired through the intermediaries? We then wouldn't have to work a series of calculations as to what the intermediary was to do, and what he was to deduct here and there. If we just take the price paid by Arkansas, Louisiana and Mississippi for the assets received through the intermediary, in each case what figure do we arrive at?

A. I don't know.

Q. Well, the price paid to the intermediary by each operating company consisted of certain securities, did it not; none of them paid any cash?

A. I can brief it in this way, for instance, as to the Arkansas situation.

For what Arkansas Power & Light was to receive from Hatch, and which flowed from Electric Power & Light Corporation, [15064] both of us keeping in mind that there

were certain outside securities that were not in the hands of Electric Power & Light, representing minor interests that had to be cared for in the situation, ultimately—Arkansas Power & Light was to issue 35,000 shares of $7 preferred; 999,994 shares of common—that being exclusive of directors' shares; and $18,000,000 principal amount of first mortgage, 5 percent bonds; and was to assume all contractual or other obligations of the corporation whose property was to be conveyed to Arkansas Power & Light, as well as of the individuals whose property was to be so conveyed.

Q. It started out by issuing $13,500,000 stated value of preferred and common stock, and $18,000,000 first mortgage bonds, did it not?

A. Yes, that would be right.

Q. Or a total of $31,500,000, ledger value of securities of Arkansas?

A. That would be correct.

Q. In addition, it assumed, you say, certain obligations of one kind or another, but these $31,500,000 of securities were issued to Hatch, weren't they?

A. That is correct.

Q. And actually passed over to Electric Power & Light Corporation?

[15065] A. Not altogether. The proceeds from some, the net, was passed on.

Q. Now in the case of Louisiana Power & Light, what securities did they issue to Hatch?

A. Louisiana agreed, for the assets it was to receive under the Hatch agreement, that agreement being dated August 1, 1927, to issue to or upon the order of Electric Power & Light Corporation, 30,000 shares of $6 preferred; 35,000 shares of $6 second preferred; and 999,990 shares of common, being exclusive of directors' shares; and to issue to or upon the order of Hatch, $7,500,000 principal amount of 6 percent demand notes.

Q. Or a total of $19,000,000 ledger value of securities?

A. $19,000,000 of securities.

Q. And the Mississippi Power & Light Company issued a total of how much in securities to the intermediary, Mr. Gill?

A. About $20,000,000 of securities.

Q. Then also, there were certain shares of the Utilities Realty Company, a company which received certain unimproved property out of the properties which went to each of the operating companies?

A. No, I don't think it did—it did in Louisiana.

[15066] Q. Well, where did it? Do you think the Utilities Realty was applicable to Louisiana real estate only?

A: I am checking that point.

I don't think there were any properties accepted in Mississippi.

There was an oil storage tank, I believe, accepted in Arkansas, and certain unimproved real estate that went to the Utilities Realty Company in Louisiana, which subsequently came back in part to Louisiana Power & Light.

Q. Well, overlooking for the time being the Utilities Realty Company, that gives us a total of $70,500,000, representing the book value of the securities issued to the intermediary by the three operating companies in exchange for the assets received from the intermediary, isn't that correct?

A. Yes, that is approximately the total.

THE EXAMINER: Before going further, the Commission has overruled the respondents' objection to the admission of Commission's Exhibits 794 and 795 for identification, and they are admitted.

MR. BERMAN: Well, may I ask to have them marked in evidence and incorporated in the record, Mr. Examiner?

THE EXAMINER: Yes, they are admitted.

(Commission's Exhibits 794 and 795 were received in evidence.)

[15067] By MR. BERMAN:

Q. Now to continue, Mr. Gill, if we subtract from this $70,500,000 figure the sum of $51,554,400 previously reached as the cost to Electric Power & Light Corporation of all the assets conveyed to these companies by Electric, we find an excess over such cost to Electric of these assets of how much?

A. In round figures, $19,000,000.

Q. And may it be concluded, therefore, that these companies did pay a price of some $19,000,000 in excess of Electric's cost for these assets?

A. No. In other words, what we have done here is an approximation, and the difference which you have established is a correct difference on the basis of the figures. They probably overlooked, as I pointed out at the beginning, certain minor debits and credits which consequently had to flow into this situation.

Q. Well, what do you maintain is the actual difference between Electric's cost and the cost to these three companies?

A. I maintain nothing as such.

Q. Well, of course your company—

A. (Interposing) My point is that I select no figure for the difference, and I am perfectly willing to discuss it on this, except I don't want, after having progressed as we have here on very brief and round figures, to say that [15068] that now is exactly and the difference. I am perfectly willing to say that the difference between the cost as shown on the books of Electric for the total of all of these properties, and the cost as evidenced by securities issued to the acquiring company, is approximately $19,000,000 difference, but I am not prepared to say that it was $19,000,000 difference.

Q. Your point lies or hinges on the word "approximately"?

A. That is correct.

Q. It might have been a few hundred thousand dollars one way or the other?

A. It might have had leeway either side, and I am not ready to define the leeway.

Q. Of course, you are aware, I am sure, that Electric Power & Light Corporation, in its U5B special supplement, reported to this commission that in connection with the organization of Arkansas Power & Light, Louisiana and Mississippi, those companies, as a consideration for the assets acquired, "issued their respective securities, the aggregate principal amount or stated value of which exceeded the cost to the registrant (such cost representing both cash payments and the stated value of shares of preferred and common stocks of registrant issued in connection with the transaction) of the physical properties and other net assets conveyed to these companies, by $18,455,493.20"—so that they claim a [15069] leeway there of approximately a half a million dollars?

A. That was my reason, Mr. Berman, for not desiring to say it was $19,000,000, because we had picked and dropped items in the calculation.

Q. There is no question, then, that this approximately $19,000,000, with leeway one way or the other, does represent the excess over Electric's cost of the assets conveyed?

A. Not at all, just as we stated there.

Q. Well, I thought that was what was stated there—

A. (Interposing) I said "not at all, just as we stated there".

Q. Oh, there is no doubt?

A. Not at all, just as we stated there.

Q. I am sure we both agree, I just want to make sure that the record doesn't contain any ambiguity.

"Not at all" means that there is not any doubt at all that this figure actually represents the excess of the price paid by the subsidiaries over the cost to Electric Power & Light Corporation, is that correct?

A. That is correct—just as stated in the U5B.

August 6, 1941

A. D. ROOT, financial analyst of Ebasco Services, Incorporated, testifying for American.

CROSS-EXAMINATION

[15251] A. At pages 9992 of the record, you asked us to inquire who Mr. Lucien W. DeBuys was, whether or not he had an office with Electric Bond and Share Company in New York, whether or not he received a salary from that company or what his mode of compensation was for acting as intermediary in the transfer of properties and securities.

It has been ascertained that Mr. DeBuys acted as an intermediary in certain transactions when properties were acquired by companies in the Bond and Share system in the same manner that other individuals acted as intermediaries in transactions of a similar nature and acted in a capacity that might be called a personalized account. We have been unable to ascertain how or why he was selected as such intermediary.

It has been ascertained that Mr. DeBuys was not an employee of Electric Bond and Share Company, American Power & Light Company, or of any of their subsidiaries, or of Simpson Thacher & Bartlett, and that he did not have an office with any of them at any time. We have been unable to ascertain by whom he was ever regularly employed.

We have been unable to ascertain what, if any, compensation was paid him or, if any, by whom. We have ascertained that the records of American and of Electric Bond and Share and of Simpson Thacher & Bartlett do not show any compensation as paid to Mr. DeBuys.

Q. Mr. Root, it was told to me by someone whose name I do not recollect at the moment, that Mr. DeBuys was a Greenwich Village house painter who was called in from time to time affix his name to a contract and was paid a few dollars for his trouble.

What is your knowledge on that subject?

A. I never heard of such a thing in my whole life.

Q. I do not think that you ought to get indignant.

A. I am amused at the devious sources of information you dig up.

Q. I do not know how devious it was, but you are unable, however, to tell us just who he was.

A. I do not have any idea. I have had nothing to do, personally, with the transactions in which he was interested as intermediary.

Q. So far as you know, he may have been a Greenwich Village house painter.

A. Or a Brooklyn capitalist, perhaps.

Q. Or perhaps along the same side as that Brooklyn capitalist.

August 12, 1941

[15578] By MR. BERMAN:

Q. Mr. Root, I understand you have some information for us with respect to questions asked of Mr. Aller, concerning Florida Power & Light Company, in the course of his previous testimony?

A. Yes, sir, I have.

At page 10,022, you asked Mr. Aller to furnish you with a schedule showing the distribution by L. W. DeBuys of the proceeds of the $30,000,000 Florida bond issue.

The records of L. W. DeBuys showing his receipts and disbursements in this transaction are not available, and a search for such records which has been made in response to the foregoing request has been unsuccessful in locating an accounting of such receipts and disbursements.

It is known, however, that L. W. DeBuys sold the $30,000,000 principal amount of bonds to Bonbright & Co. and other bankers for $26,775,000, plus accrued interest of $163,125 from January 1, 1926 to the dates of sale in February, 1926, and that he also received $125,000 from Florida Power & Light Company as interest for the month of

December, 1925 on $30,000,000, in accordance with his agreement. The total of such cash receipts by DeBuys is $27,063,125.

American Power & Light Company's records show that it received from DeBuys $9,887,922 as provided in its agreement with him, that it also received $3,871,306.85 from him to reimburse it for the cost of retiring bonds of one of the constituent companies and for other disbursements it made prior to receipt of the proceeds of the bonds by DeBuys, and that it also received $286,124.99 from him as interest on the $30,000,000 from December 1, 1925 to the dates of receipt of the cash in February, 1926. It has also been ascertained from the records of the several companies involved that DeBuys paid, in accordance with his agreements, $12,000,000 to Florida Power & Light Company, $10,000 to Utilities Land Company, $5,000 to Stuart Water Company and $5,000 to St. Augustine Company, and that he paid $450,000 to Electric Bond and Share Company as commission on the sale of the bonds. The total of the foregoing payments is $26,517,353.84. The balance for which we do not have details presumably represents disbursements by DeBuys for the costs of organizing the several new companies, the issuance of their securities, conveying the physical properties and securities, to the new companies, recording the new mortgage, issuance taxes, legal expenses in connection with the new bond issue and the formation of companies, and the numerous other matters involved in a transaction of this size.

* * * * * *

[15592] MR. BERMAN: Mr. Root a few moments ago read a statement in which he said that Mr. DeBuys received the proceeds of $30,000,000 principal amount of bond issue of Florida Power & Light Company. Now I think there would scarcely be any dispute that Mr. DeBuys never saw $30,000,000 in his life. Actually, this was a bookkeeping transaction; pursuant to certain contracts Florida Power & Light Company issued

$30,000,000 of bonds as well as other securities; those bonds were sold to a group of bankers, all by Electric Bond and Share and American Power & Light people, and the proceeds were distributed here, there and elsewhere, allegedly in the name of Mr. DeBuys.

Now I asked Mr. Aller to tell us where the proceeds and how the proceeds of the $30,000,000 of bonds was distributed, and I am unable to find out because their answer is that Mr. DeBuys' records are "not available."

My point is that I don't need Mr. DeBuys' records, I want Electric Bond and Share Company's and American Power & Light Company's records.

THE EXAMINER: A lot of this appears to be argument. Let's proceed by question and answer.

MR. CALKINS: May I have Mr. Berman's last statement read back, please?

(The record was read)

MR. BERMAN: I am content, Mr. Examiner, to let the record stand at this point, with the request that I have made, and I will expect to hear from the witness when he next resumes the stand as to what he is able to tell us on this score.

MR. CALKINS: Don't you think you had better state it at one place—

THE EXAMINER: Will you ask a definite question?

MR. BERMAN: It seems to me it is very definite that I have asked you to ascertain whether you are in a position to state definitely that Lucien W. DeBuys was a Greenwich Village house-painter.

THE EXAMINER: That is one question; question No. 2?

MR. BERMAN: That such Greenwich Village house-painter was called in to sign his name to these docu-

ments in the Florida transaction, and that having done so he walked out and never had any other interest in the matter, never kept any books and records concerning the matter, and knew nothing about the matter. That is question No. 2.

The third is that I ask you to ascertain whether it isn't a fact that Electric Bond and Share Company and/or American Power & Light Company kept certain records which were ostensibly the DeBuys records, in which they recorded all the details of these transactions carried on in the name of DeBuys?

Fourth, I ask you to ascertain exactly where those books and records are, and if they are not available, to give us all the details with respect to their disappearance?

THE WITNESS: I will, of course, Mr. Berman, endeavor to determine the answers to the questions which you have asked me. However, I doubt whether or not I will be able to find any more information than I have already found in that connection.

COMMISSION'S EXHIBIT 1010

AMERICAN POWER AND LIGHT COMPANY

Two Rector Street

New York

October 2, 1941

Mr. Alfred Berman, Esq.,
Securities and Exchange Commission,
Washington, D. C.

Dear Mr. Berman:

Referring to your inquiry concerning the identity of Lucian W. de Buys, I have made further investigation and am now advised that he was a personal acquaintance of a former Vice-President of Electric Bond and Share Company. Mr. de Buys was a resident of New York City at that time and an artist by profession.

Apparently his attempts to earn a living from his painting were unsuccessful and he was anxious to supplement his limited income from other sources. The former Vice-President of Electric Bond and Share Company arranged for him to act as an intermediary, at a relatively small remuneration, in certain reorganizations in the same manner as other individuals acted as intermediaries in other transactions. Mr. de Buys subsequently acted as intermediary in a similar way at the time of the organization of Florida Power & Light Company.

From what my investigation disclosed, I do not believe Mr. de Buys kept any records regarding such transactions, and he played no role other than affixing his signature to documents handed him, and routine acts in connection therewith. It is my understanding that the usual fee or compensation paid to intermediaries in other cases did not exceed $500, and I assume that the compensation paid Mr. de Buys in each case in which he acted was in that order.

His present whereabouts are unknown to me or to the former Vice-President above mentioned, and have been for many years.

Very truly yours,

D. W. JACK

Commission's Exhibit 17 in the Matter of Florida Power & Light Company et al, File No. 59-26, Securities and Exchange Commission.

COMMISSION'S EXHIBIT 1010A

ATLAS CORPORATION

ONE EXCHANGE PLACE

JERSEY CITY, N. J.

November 24, 1941

Alfred Berman, Esq.
Securities and Exchange Commission
Washington, D. C.

Dear Mr. Berman:

I have read the letter regarding Lucien W. de Buys written to you under date of October 2, 1941, by D. W. Jack of American Power & Light Company. I am the former Vice-President of Electric Bond and Share Company referred to in the letter, and Mr. Jack's statements therein as to the identity and manner of employment of Mr. de Buys are in accordance with the facts, with the following exception: Mr. de Buys was not an artist by profession in the sense of painting, so far as I know, but his training and capabilities seemed to be limited to artistic lines and such living as he made was in working in art galleries selling pictures and objects of art on a commission basis.

Very truly yours,

FLOYD B. ODLUM

March 25, 1942

EDGAR H. DIXON, Secretary and Treasurer of Electric Power & Light Corporation.

CROSS-EXAMINATION

[16633] Q. Do you have any further information for us at this point?

A. At page 15684 you requested Mr. Gill to furnish you with a statement showing how the figure of $13,057,779 on Commission's Exhibit 931, which was a statement showing Electric Power & Light Corporation investment in the Arkansas, Louisiana and Mississippi situations, was built up.

I have with me and submit to you in duplicate such statement. (Document handed to Mr. Berman)

The other open item that I have a note of has to do with the reasons for the discrepancy of $204,974.33 between the amount [16634] received by Mr. Hatch and the amounts that were paid out by Mr. Hatch as reflected by the Hatch-Arkansas reorganization account on Electric's books.

Q. Do you have the page of the transcript at which that question arose?

A. Yes, I do. That was pages 16603 and 16604.

Our search in connection with this particular item has been in many ways. We have talked with people who might have had some connection with the transaction; we have talked with Mr. Hatch himself and have asked him if he would search to see whatever records he might have available, if any.

We have read him the testimony and shown him what records we had, in an effort to revive his memory as to whether that is all that is left.

In addition to that we have tried to use our ingenuity to see what kind of items he may have been required to pay, by the nature of the agreements themselves.

In other words, he undertook to pay certain expenses of the reorganization and while our study is not complete, I think you will be interested to know that we have made some progress. For instance, we searched through our Elec-

tric Power & Light Corporation vouchers, and we found some five or six items aggregating $9,775.27 which were paid in the first instance by Electric, and which subsequently we were reimbursed for by Mr. Hatch.

[16635] We made the inquiry of the Arkansas Power & Light Company and asked if they would make a similar search.

I have a letter from Mr. Bodie, the treasurer, who tells me he has found an item of $6,750.07 in December, 1926, which covered the purchase of certain Internal Revenue Stamps for which the company was reimbursed by Mr. Hatch.

We made inquiry of the account bookkeeper of Simpson, Thacher & Bartlett to see if he might have a record of any invoices paid him by Mr. Hatch, and we find they did receive a payment of $27,000 in settlement of some legal fees.

Q. What was that?

A. Payment by Mr. Hatch to Simpson, Thacher & Bartlett for legal fees.

In other words, up to the moment we have been able to account for roughly $45,000 of this difference, and as indicated before, our search is not ended.

I should like to keep this item open temporarily until we can conclude the other avenues of our search.

Q. Well, your reference to the questions you asked Mr. Hatch, Mr. Dixon, might indicate that Mr. Hatch knew something about this transaction. Did you find he did?

A. Yes. He recalled the transaction and I was making a very diligent effort to comply with this request and find the difference.

[16636] My first request was whether he had any checks or check stubs. That would seem to me to be the obvious approach. I found he did not have that material.

Q. Let me interpose, Mr. Dixon. I think it is perfectly plain from the record where other intermediaries have come into the picture, that these intermediaries had no beneficial interest in the transactions, that none of them as such kept books or records or really knew what was going on, but all such records were kept by Electric Power & Light in the

form of the Hatch account or the name of the particular intermediary.

Are you suggesting, Mr. Dixon, that Mr. Hatch actually received properties and kept records with respect to them and paid them out and so forth in this transaction?

A. You asked Mr. Gill if he would seek to determine what had happened in this transaction. I think it is perfectly obvious in the use of an intermediary that while he may perhaps not take physical possession of property and other things, certain of the items are going through his account and if you find an indication that he was paid a certain amount of money, the obvious approach is to see if he didn't sign some checks to spend that money, and we found that he did.

It seems to me the logical approach to find what a fellow did is to ask the fellow.

Q. Was it the logical approach in this situation?

[16637] A. I thought so. Certainly Electric Power & Light had no account it maintained for his benefit.

Q. It didn't have a Hatch account?

A. Certainly it had a Hatch account, but not for this purpose.

Q. Didn't they have a Hatch account in which they listed the sums Hatch had to pay out and the sums Hatch was due to get, and which reflected various entries, moneys coming in and moneys going out?

A. It is true Electric Power & Light had a Hatch account, but not of the nature you have in mind.

We had an account to which we charged payments made for his account and transactions of that nature, but certainly I have with me physical evidence of the fact that there were certain items applicable to the transaction that were handled by Hatch other than through the Hatch Account. That was his accounting to Electric Power & Light Corporation.

Q. Then, I understand from you, Mr. Dixon, that Mr. Hatch actually played an active role in these transactions which involved a carrying out of the so-called Hatch agreement.

A. I assume he did. I have found some indication that he signed some checks and—

Q. I don't doubt he signed checks, all right. But checks drawn on what account? Not on his regular funds, were they?

[16638] A. I doubt it, and that is what I am trying to find out, what account he might have used.

Q. My only interest in this subject is not to get the record muddied or confused. In the past I think the record has clearly established that certain names were used and certain individuals were paid for the use of their names as intermediaries, DeBuys and three or four others, other than Hatch.

I understand Hatch was used in the same capacity, and yet the statement you made earlier would seem to indicate that Hatch played an active rôle and I am trying to elicit from you the information as to whether you are seeking to change the picture which the record presents as to the activities of these intermediaries, or whether you merely made a remark that had no particular significance or bearing on that point.

MR. FROMEN: May I interrupt a moment, Mr. Berman? When you speak about "active rôle" I presume you had better define what you mean by "active".

MR. BERMAN: Let us go off the record a minute.

(Discussion off the record.)

By MR. BERMAN:

Q. Mr. Dixon, as a result of the discussions we have had, am I correct in understanding that you did not mean the record to indicate that Hatch played any different rôle in this transaction than the record indicates intermediaries [16639] customarily played in this type of transaction?

A. You are correct in that statement.

Q. Very well. Now, as the matter stands, I understood you to say you feel that you have been able to derive some indication as to the expenditure of some $27,000 or $28,000 of items out of that missing $205,000. Is that it?

A. No, sir. The amount was about $45,000, I believe.

Q. You have vouchers or a schedule before you which will indicate the $45,000?

A. I have some vouchers for $9,775.27; I have a letter from the Arkansas Power & Light Company for $6,750.07, and I have some notes of a telephone conversation that my head bookkeeper had with the bookkeeper of Simpson, Thacher & Bartlett dealing with the payment to that firm by Mr. Hatch of some $27,215, or an aggregate of roughly $44,000 or $45,000.

Q. That leaves then $155,000 or $160,000 unaccounted for as yet.

A. That is correct.

Q. And you are going to continue your searches for information as to what became of the $160,000?

A. That is correct. I should like to leave that request open so that I might continue my search.

Q. Now, of course, if you referred to the Hatch account or the account in which Hatch's receipts and expenditures were [16640] entered, that should indicate to you what became of that money should it not?

A. No, sir, not on the books of Electric Power & Light.

As a matter of fact, these vouchers that I have here of some $9,775.27, none of those went through the Hatch account that we have been referring to. They were charged to "Accounts Receivable, L. B. Hatch" and did not go through the Hatch account as such.

Q. Well, I don't care where the items were entered, Mr. Dixon, but since Mr. Hatch had no beneficial interest in this transaction, somewhere somebody must be able to account for $160,000, and that somebody must be Electric Power & Light Corporation, must it not, since it is its money that is being used here?

A. Believe me, Mr. Berman, I am as anxious to find out what happened to that $160,000 as you are.

Q. I should think you would be considering it is $160,000 of corporate funds of Electric Power & Light Corporation that apparently disappeared.

A. That is why my search has been more diligent than you think is wise.

Q. I don't think any part of the search has been unwise. I am sorry it has not been more fruitful.

A. I am extremely sorry, myself.

Q. Mr. Hatch did not pocket this $160,000, did he?

[16641] A. I have no idea what happened to that $160,000, Mr. Berman.

Q. You referred to conversations you had with Mr. Hatch. I suppose you did not ask Mr. Hatch if he pocketed the $160,000. Did you ask him that question?

A. Frankly, no.

MR. FROMEN: On behalf of Mr. Hatch I might say I resent the implication that L. B. Hatch might have pocketed this money, or the inference to be drawn from Mr. Berman's question.

MR. BERMAN: It is all right with me for Mr. Fromen to say it in his own behalf or on behalf of Mr. Hatch. My question was directed to elicit the fact that nobody else thought Mr. Hatch had walked off with this money and, therefore, that Electric Power & Light must be able to account for this money.

If the reader of the record were not familiar with the facts, he might not think it strange that an individual who embarked on transactions involving $30,000,000 to $35,000,000, or whatever passed hands, might very well have emerged with $160,000, and that might not be considered an undue profit in a substantial undertaking of this kind.

We know, however, that Mr. Hatch was never considered a beneficial party and his compensation was merely nominal as was the compensation of intermediaries, so that eliminates the possibility that he was given the $160,000 for handling these [16642] transactions.

Therefore, that leaves the question as to where that $160,000 is and it would seem to me important for the corporation and its stockholders to ascertain that information.

You agree, don't you, Mr. Dixon?

THE WITNESS: Very definitely, as I stated before on the record.

It is a matter of quite some concern to me.

COMMISSION'S EXHIBIT 389

[From Samuel W. Murphy, now president of Electric Bond and Share Company, but then a member of its legal department, to Frank A. Reid, the company's general attorney. This exhibit contains a series of handwritten marginal annotations made by Mr. A. D. Root, who is referred to in the exhibit (R. 11,105-06). The annotations are printed here as footnotes.]

April 18, 1927.

Mr. Frank A. Reid,

OFFICE

In Re: Pennsylvania Reorganization

In connection with the Pennsylvania reorganization proposed by Mr. Root I have the following comments to make:—

First: As a general comment I suggest that as far as possible both reorganizations be run at the same time and in connection with each other; that is all agreements and all plans of reorganization should be laid so that no one will be able to separate one part of the reorganization from the other part. My reason for this is that while in the Pennsylvania Power & Light reorganization the increase in the Plant Account is apparently not so large, the increase of the Plant Account in the so-called Susquehanna Power & Light reorganization is tremendous, and we must not forget that in Pennsylvania the Commission has the right to approve or disapprove the acquisition of utility properties by a public utility.

I suggest, therefore, so that the Commission will find it much more difficult to unravel the cost of the various properties, that we go before them with a plan that contemplates both the transfer of certain properties to Pennsylvania Power & Light Company, as well as the formation of a new utility company, and also the transfer to the Lehigh Valley Transit Company of the railway properties, so that it will be practically impossible for anyone to find out what the cost of any individual property was or the cost of any

particular group of property. I believe that while you could get the Commission to approve your Pennsylvania Power & Light reorganization, they would not approve the Susquehanna Power & Light reorganization, but they might be willing to approve the reorganization of all your properties in Pennsylvania if it would be impossible for anyone to determine at what figure the various properties were going into the whole reorganization.[1]

Second: In addition to the above, I make the following specific comments on the various reorganization plans:—

A. PENNSYLVANIA POWER & LIGHT REORGANIZATION:

1. I suggest cancellation of all liens except East Penn Electric 6's, East Penn Electric 5's and Lykens Valley 6's. My reason for this is that if it can be done without too great a cost it will eliminate the trouble of funding property subject to prior liens under our Pennsylvania mortgage with its necessary allocation of property subject to prior liens and its confusion in the future.[2]

2. I think a decision should be made as to whether we will call the East Penn Electric Preferred Stock still outstanding or whether we will sell assets and liquidate. I suggest you have the charter checked to determine whether the cost is more if the stock is called rather than to liquidate. I also suggest for your consideration the calling of the stock in any event so that an obstreperous stockholder could not raise the question of equity in selling to ourselves.[3]

3. I suggest that it would be better to transfer the property and assets of the Williamsport Railway Company [4] and the railway property of the East Penn Electric Company to separate corporations and then transfer securities of the Lehigh Valley Transit Company rather than the railway assets above mentioned. My reason for this is an op-

[1] Isn't this a matter of presentation only?
[2] P. B. S. [P. B. Sawyer, vice president of National Power and Light Company] originally said no. He may change his mind now.
[3] This question already considered. Believed best to call.
[4] No reason for this.

erating reason, namely that Mr. Sawyer might find it better to have a number of small operating railway companies rather than have the Lehigh Valley Transit Company enter into a new field of operation. This question, however, can be better answered by Mr. Sawyer.[5]

4. I do not understand why $2,500,000 of electric light property is transferred to the East Penn Electric Company in place of $1,500,000 railway properties, although I believe that in the general mix-up we can transfer any amount of property to the East Penn Electric Company in place of the railway property and it will not make any difference. I am, however, not entirely clear as to this and suggest that you talk to Root about it.[6]

5. I notice that Root has capitalized $600,000 odd dollars of dividends which will be declared out just prior to the reorganization. This makes me wonder if perhaps some additional dividends have not been added to our cost of the property and have not been capitalized. I believe that if dividends have been capitalized we should not do so for the reason, not only that we are going before a Commission on this whole transaction and capitalization of a dividend, in my opinion, is a particularly vulnerable point of talk, but also Mr. Stebbins is having great difficulty in finding valuations equal to our cost and it looks to me as though the cost was two or three million dollars too high.[7]

6. I notice that there is an increase in the surplus of Pennsylvania Power & Light Company on this transaction which I don't understand and again I point out the fact that we will have to go before the Commission. In my opinion we should be careful not to have the surplus of the operating company increased by this transaction.[8] Otherwise we might have difficulty before the Commission.

7. Before we do anything check should be made to see that the authorized indebtedness of the Pennsylvania Power

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[5] OK if P. B. S. prefers.
[6] OK as is.
[7] This is up to P. B. S.
[8] Dividend from East Penn. Do it before the reorganization as contemplated in plan.

& Light Company is sufficient to take care of the funding operations that we desire to go through and if not that the indebtedness is properly increased. My recollection of the Pennsylvania law is that it takes 60 days to do this.[9]

8. I think that in this Pennsylvania Power & Light reorganization we should try to work in the ½ of the Scranton or Stanton (I don't know which) power house. I am referring to the power house which has been built jointly by us and the American Gas & Electric Company. It may be that we can fit this in in some such way that we can get out some common stock without increasing our valuation for bonding purposes.[10]

B. SUSQUEHANNA POWER & LIGHT REORGANIZATION.

It is very difficult for me to give you intelligent comments on this reorganization as I have been unable to lay my hands on the corporate charter and I suggest that we set Priest at making a corporate charter before we finally give our approval to this reorganization. However, the following are my comments:

1. I think that we should not only figure out whether the 7% bonds are to be called but also whether the 6% or even 5½% bonds should be called. I suggest also that a study be made as to the advisability of calling the 5% and the 4% bonds. I assume that this study will show it to be too expensive but I think we ought to know about it.[11]

2. I notice that the Harrisburg and the Lancaster Companies have outstanding $50. Preferred Stock which the plan calls for exchange in the merger. I assume that it is not contemplated to create a $50 Preferred Stock of the new company but that the exchange will be made on a basis of one share of the new for two shares of the old.[12]

3. I think the increase in Plant Account through the medium of the X Company, when the X Company will merely

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[9] OK.
[10] Sawyer says no.
[11] P. B. S. originally said no.
[12] OK. No. $50 stock to be out.

get the assets of two little companies [13] and in addition some stock, is very dangerous when you are going to appear before a Commission. I believe that we should transfer to the X Company all the assets that we can possibly lay our hands on if we are going to increase the Plant Account. I suggest that all the companies whose stock we own 100% and which have no liens on their property be transferred to the X Company, and the security of only those companies where we have a part ownership or where there is a lien attached to the property be transferred to the X Company. Otherwise the increase in Plant Account is too obvious and can be traced too easily. I believe this to be a very dangerous part of the plan and I think before anything of this sort is done we should consider it very carefully. I particularly call your attention to the fact that we do not have in this case any property owned by any individuals but it is all owned by companies. It is the first reorganization that I have had anything to do with where a step-up in Plant Account was not made with property owned by individuals who could have no balance sheet, the net effect of which was to make it impossible to trace the increase. I simply call your attention to this as apparently the Plant Account has been increased from $25,000,000 to $61,000,000 on the basis of the transfer of the assets of the Lititiz Gas Company and the Intercourse Electric Company.[14]

4. I notice some water supply companies are to go into the reorganization and I think we should consider the question as to whether we want our new company to be also in the water supply business.[15]

5. Inasmuch as under the Pennsylvania law there is a provision for the increase of the indebtedness upon a vote of the stockholders of a corporation, I suggest for your consideration that we agree as we did in Arkansas to have the

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[13] S. W. M. [Samuel W. Murphy, the author of this exhibit] apparently didn't read plan very close. It provides for X Co. securing assets of United Elec., Lititz Gas & Intercourse Elec. Co. [3 Co's]

[14] That is exactly what has been done in plan. S. W. M. missed part of it.

[15] Up to P. B. S.

new company issue the bonds and make the mortgage prior to the merger so that the merged company will take over not only the obligation but the property actually subject to the lien of the outstanding bonds.

I again desire to impress upon you the importance, in my opinion, of scrambling all these reorganizations together so that about the only thing the Pennsylvania Commission will be able to understand will be the result and not how the result was reached.[16] Root's reorganization, in my opinion, is too simple and too easy to follow, particularly the Plant Account of the Susquehanna reorganization from $25,000,000 to $61,000,000 through a merger. I also desire to call your attention to the fact that Mr. Sawyer desires to talk over this whole matter with Governor Fisher of Pennsylvania, and I believe that we do not want to put Mr. Sawyer in the embarrassing position of giving him a plan to submit to the Governor, which the Governor would approve if no figures were presented to him, and then have the Commission refuse to approve the transfer of the utility properties because of the tremendous increase in Plant Accounts. The net result of Root's plan as I see it is to have the whole Susquehanna situation cost Lehigh nothing, and while I believe that is a very salutary result in the ordinary case, I do not believe that we ought to risk obtaining this result by damaging our reputation before the Pennsylvania Commission. Such a result, in my opinion, might start an investigation into our whole rate and financial structure in Pennsylvania and lead to all sorts and kinds of consequences.[17]

I merely repeat this in order that you may know that I feel very strongly that in states where we have commissions on reorganizations we should not attempt to get too much of our cost repaid.

SWM*CCC SAMUEL W. MURPHY

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[16] This plan at its present stage is for home consumption only, and I tried to make it simple for that reason. Is not scrambling just a matter of presentation?

[17] Don't see how commission will see original costs, as they are all on Lehigh Books.

COMMISSION'S EXHIBIT 140

AMERICAN POWER & LIGHT COMPANY

71 Broadway
New York

August 6, 1917,

Electric Bond and Share Company,
71 Broadway,
New York, N. Y.

Dear Sirs:

Inasmuch as the monthly salary of the Chairman of our Board of Directors is $1,041.66 rather than $1,000.00 as stated in paragraph three subdivision D under the heading "Fiscal Agency Service" of the agreement between us dated May 1, 1917, we suggest that said paragraph be changed to read as follows:

> "The President of the Electric Bond and Share Company is now receiving from your company a salary of $1,041.66 per month as Chairman of your Board of Directors. As long as your company continues to pay this salary the amount so paid may be deducted from the payments made by you to this company, under the terms of this agreement."

If such change is satisfactory to you, will you please so notify us by letter.

Very truly yours,

AMERICAN POWER & LIGHT COMPANY,

By .....,

Treasurer.

May 1st, 1917.

American Power & Light Company,
71 Broadway,
New York, N. Y.

Dear Sirs:

We understand that your company controls, directly or indirectly, through stock ownership, the Southwestern Utilities Corporation and the Southwestern Power & Light Company, both of which will be hereinafter referred to as "Holding Companies".

That the Southwestern Power & Light Company controls, directly or indirectly, through stock ownership, the following operating companies:

Texas Power & Light Company
Fort Worth Power & Light Company
Wichita Falls Electric Company
Wichita Falls Water Company
West Texas Electric Company
Sweetwater Ice & Cold Storage Company
Eagle Pass Water Company
El Paso Gas Company
Paris Transit Company
Galveston Gas Company
International Electric Company
The Hutchinson Gas and Fuel Company
The Newton Gas and Fuel Company.

That you also control, directly or indirectly, through stock ownership, the following operating companies:

Kansas Gas & Electric Company
Pacific Power & Light Company
Portland Gas & Coke Company
Walla Walla Valley Railway Company.

All of the companies above referred to as "operating companies" will hereafter be referred to as "Subsidiaries".

If the proposal hereinafter set forth in this letter is accepted by you, it is proposed to divide the Subsidiaries for the purpose of efficient supervision and administration into groups under the following designations:

TEXAS GROUP

To include all subsidiary companies operating in Texas.

KANSAS GROUP

To include all subsidiary companies operating in Kansas.

NORTHWESTERN GROUP

To include all subsidiary companies now operating in the northwestern states.

As from time to time additional subsidiary companies are acquired, new groups, consisting of one or more companies, may be added.

Commencing May 1, 1917, we offer to take charge, under your direction, of the management of your Company, its present Holding Companies, and the management and development of all Subsidiaries, placing at your disposal the experience, advice and assistance of our entire organization. The services we propose to furnish may be divided into three classifications:

I. *Operation, Management and Supervision* (see page 5). Management of the affairs of your Company and its present Holding Companies, including accounting, office room and publicity work. Operating management of Subsidiaries including supervision of the issue of bonds and stocks of Subsidiaries, the filing of Federal and State Reports, dealings with public authorities, and, subject to your control, all operating matters connected with the extension and improvement of Subsidiaries' properties; also consulting engineering services of our engineering department.

Supervision of operation of Subsidiaries. Supervision of general matters other than those of operation.

II. *Special Engineering Services* (see page 11), including the construction of any hydro-electric or steam-electric development, transmission lines, or other additions, gas plants and extensions thereof, or reconstruction of the properties of Subsidiaries which it may not be economical to handle with the respective organizations of Subsidiaries, and which you or Subsidiaries may direct us to construct.

III. *Fiscal Agency Service* (see page 18), covering the negotiation and sale of bonds and stocks of your company, its present Holding Companies and of Subsidiaries, and assisting in the securing of loans.

I.

OPERATION, MANAGEMENT AND SUPERVISION

A. Management of the affairs of your Company and its present Holding Companies: We will supply the services of two or more of our Vice-Presidents to act as officials of your Company and its present Holding Companies, if you so desire, and of members of our accounting department to act as Secretary and Treasurer and Assistant Secretary and Assistant Treasurer of your Company and its present Holding Companies and to perform the services and duties usually performed by such officers, including keeping the books and accounts for your Company and its present Holding Companies. We will give careful attention to all publicity matters in connection with the affairs of your Company and its present Holding Companies, including all questions which may arise with the Federal Government.

B. *Operating Management of Subsidiaries:* The local manager of each Subsidiary or Group of Subsidiaries will be employed, subject to your approval and the approval of the respective Subsidiaries, and at your expense or the expense of the Subsidiaries. He will keep us advised of all matters connected with the operation and local standing of the Subsidiaries, and will carry out our instructions in the operation of the Subsidiaries, subject, of course, at all times, to the control of the Boards of Directors of your Company and Subsidiaries.

C. *Supervision of Operation of Subsidiaries:* We propose to furnish, at our expense, the services of our Operating Department, in charge of one of our Vice Presidents, including—

1. A "*Sponsor*" who will be one of our operating Specialists, who shall be known as "Sponsor for ..... Group, American Power & Light Company properties".

2. *Operating Committee* consisting of said Vice President and all Sponsors. This Committee considers and decides all ordinary operating questions calling upon the President and other members of our organization for advice and suggestions in important matters. This Committee will submit to you its recommendations as to improvements and extensions of the properties of subsidiaries, or as to the purchase of other property, with full details. It will also submit, for decision by your Board of Directors, matters of general policy, and be governed by such decision.

3. *Auditing Department*, which will supervise the accounting systems, check the monthly financial reports and vouchers of Subsidiaries, and their Federal, State and Municipal reports and tax returns. The head of this Department,

or one of his assistants, will act as Secretary and Treasurer of Subsidiaries, if desired. This Department will furnish to you monthly statements of the earnings and expenses of Subsidiaries, and from time to time such additional statements and analyses of operating matters of Subsidiaries as such Department may consider necessary, or as you may at any time request. The services of a member of this Department will be furnished to visit from time to time the general offices of subsidiaries for the purpose of checking methods and conditions and advising as to improvements.

4. *Purchasing Department* which will assist in the purchase of apparatus and material, and the routing and tracing of shipments. The subsidiaries will be included in the large general purchase contracts made by us for lamps, transformers, meters, etc., whereby, through the large volume of purchases, lower prices are secured.

5. *Engineering Department:* We will also furnish the services of our Engineering Department for all New York office consultation on operating matters. This Department is fully equipped to deal with all phases of public utility engineering, and has at present an annual arrangement with Messrs. Sargent and Lundy for the benefit of their expert advice and consultation in all matters involving steam engineering.

When the annual gross receipts for any Group exceeds $4,000,000.00, we will furnish, at our expense, the services of an engineer who shall live in one of the cities served by one of the Subsidiary Companies in the Group. He will be a member of your organization, with the title of "Chief Engineer" of the Group. He shall be satisfactory to, and subject to, the orders of the manager of the Group.

Special engineering services will be furnished as specified under the heading "Special Engineering Services" (See Page 11).

D. *Supervision of general matters other than those of operation:* We propose to furnish the services of our Corporation Department, in charge of one of our Vice Presidents, which, with the assistance of your attorneys, will supervise the calling of Stockholders, Directors and Executive Committee meetings of your Company, its present Holding Companies and Subsidiaries, the records of such meetings, the filing of reports and other dealings with Federal, State and Municipal authorities, all matters arising in connection with mortgages of your Company, its present Holding Companies or Subsidiaries, or the Trustees of such mortgages, and such other corporate matters as may arise. This Department keeps informed as to decisions and orders of the various State Public Service Commissions and rate regulation decisions of the Courts, and will from time to time advise the local manager and local attorney of each Subsidiary or Group of Subsidiaries of important decisions, and will advise with them in their dealings with State and Municipal authorities.

E. COMPENSATION:

We propose to furnish, at our expense, all ordinary and office expenses incidental to the maintenance of the above organization in our New York office, which includes all overhead expenses necessary to carry on the details of this work for the sum of $3,000. per year for services rendered the present Holding Companies and an amount equal to $2,500.00 per annum for each operating Group, plus a percentage of the gross earnings from the operation of each individual Group, exclusive of earnings between the Subsidiaries and of interest and dividends on securities of other companies

held by Subsidiaries, according to the following schedule:

1½% on first $4,000,000 of gross earnings of Group
1⅜% " next 3,000,000 " " " " "
1¼% " " 2,000,000. " " " " "
1⅛% " " 1,000,000. " " " " "
1% " all excess.

In the case of subsidiaries which purchase natural gas at wholesale for distribution and sale, the gross of such subsidiaries for the purpose of calculating compensation under this section shall be the total gross of such subsidiary less the purchase price paid for such natural gas.

You are to reimburse us at cost for all traveling and incidental expenses other than regular routine office expenses mentioned above which may be incurred from time to time by members of our organization in connection with performing the foregoing services. Payments of charges for services and reimbursement of expenses shall be made monthly for services and expenses of the preceding month.

II.

SPECIAL ENGINEERING SERVICES.

In connection with the foregoing, we will furnish to your Company, its present Holding Companies or Subsidiaries, as may be requested, the following special services:

A. *Special:* We will furnish you such engineering services (aside from office consultation on operating matters), as your Company, its present Holding Companies or Subsidiaries desire from time to time, for studies, investigations, inspections, reports, etc., at payroll cost to us for the time of the men employed (including overhead expenses and annual retainers paid

to independent consulting engineers), plus 15% of such cost. Such "overhead expenses' shall not exceed 85% of such pay-roll cost.

You are to reimburse us at cost for all traveling and incidental expenses other than regular routine office expenses mentioned above which may be incurred from time to time by members of our organization in connection with performing the foregoing services. Payments of charges for services and reimbursement of expenses shall be made monthly for services and expenses of the preceding month.

B. *Construction:* In the event of additions, extensions or reconstruction of the properties of Subsidiaries which can not be economically handled by the operating organizations of Subsidiaries, we will, when specially authorized by your Board of Directors, furnish complete engineering plans for the work, and do, or cause to be done, the construction work, for a sum equal to the cost of such construction work (including traveling, overhead and living expenses), plus a percentage varying with the cost of the work as follows:

4% on first $100,000.00 cost of the job
3½ on next 700,000.00 " " " "
3% on all excess.

Where more than one such authorization for construction in the same Group is made during any calendar year the foregoing percentages shall be computed on the aggregate cost of the work covered by all such authorizations.

III.

Fiscal Agency Service.

In connection with, and in addition to, our management proposition as above, and on the express condition that you place us in full charge (subject to your control) of all mat-

ters connected with the negotiation and sale of all the securities issued by your Company, its present Holding Companies or Subsidiaries, we propose to furnish the services of our Securities Department, in charge of one of our Vice Presidents, to act as your Fiscal Agents, including—

A. *Sale of Bonds and Stocks:* The negotiation and sale of bonds and stocks issued by your company, its present Holding Companies or Subsidiaries, subject to your approval as to prices and terms, including all details in connection with such negotiation and the delivery of the securities. Pending the sale of any of your securities they will be held for you in our safe deposit vaults without charge. This Department, through its connections both in this country and in Europe, will constantly endeavor to develop and maintain a broad market for your securities.

B. *Loans:* This Department will also assist you in securing loans.

C. *Statistical and Publicity Services* will be provided for the preparation of necessary financial and physical information regarding your property, and to prepare for publication such booklets, earnings statements and other information as you may direct.

D. *Compensation:* We propose to furnish, at our expense, all offices and ordinary office expenses incidental to the maintenance of the above organization in our New York Office, which includes all overhead expenses necessary to carry on the usual details of this work.

1. *Services:* We propose to furnish all the above for your Company, its present Holding Companies or Subsidiaries on the basis of the following percentages of the par value of the securities sold:

(a) Where securities are sold from time to time, each sale being a separate negotiation:

First Mortgage Bonds	1½%
Preferred Stock	3%

(b) Where securities are sold under an option contract covering a period of years, including in the contract a schedule of prices for the securities in each of several specified periods:

On Par Value Sold Under Contract	On Initial Sale	On Subsequent Sales
First Mortgage Bonds	1½%	½%
Preferred Stock	3%	1%

An accounting shall be rendered you promptly for each sale of securities showing gross amount received, and the net amount after deducting our compensation as above shall be handed you in New York funds. (Nothing in the above shall be held to cover stock or bonds sold by the Company to stockholders under stockholders rights of subscription).

2. *Expenses:* You are to reimburse us at cost for any printing or publicity work carried out under your instructions, and for traveling and incidental expenses, other than regular routine office expenses, which may be incurred from time to time by members of our organization in connection with performing the foregoing services. Payment of charges for services and reimbursement of expenses shall be made monthly for services and expenses of the preceding month.

3. The President of the Electric Bond and Share Company is now receiving from your Company a salary of $1,000. per month as Chairman of your Board of Directors. As long as your Company continues to pay this salary the amount so paid may be deducted from the payments made by you to this company under the terms of this agreement.

TERMINATION OF THIS AGREEMENT

This agreement may be cancelled on thirty days' notice in writing from either party on and after May 1st, 1918.

Your acceptance endorsed hereon shall constitute the agreement between us.

Yours very truly,

ELECTRIC BOND AND SHARE COMPANY,

By E. K. HALL,
Vice President.

The foregoing correctly expresses the understanding between us, and is hereby accepted.

AMERICAN POWER & LIGHT COMPANY,

By F. G. SYKES,
President.

Dated: May 10, 1917.

COMMISSION'S EXHIBIT 507

"Exhibit D"

Electric Power & Light Corporation,
71 Broadway,
New York City.

Gentlemen:

We hereby submit to you the following Proposal with respect to services to be rendered by us to you and to your operating subsidiaries:

1. We will coöperate with you so far as reasonable and proper for us so to do, to the end that each one of your subsidiary operating public utility companies will enter into a Supervision Agreement with us in the form attached, with such modification thereof or changes therein as may be mutually agreeable. As to the period or periods during which such an agreement is not in force with any such subsidiary, we will furnish services to said subsidiary if and when requested by it or by you so to do to the same extent as if said agreements had been executed, such services to be furnished subject to the direction of the respective Boards of Directors and to be charged for on a reasonable basis of compensation found mutually satisfactory. The compensation so received from the said subsidiaries shall serve as a credit against the payment of full compensation and as more fully set forth in paragraph 3 hereof.

2. We will furnish to your Company the following services:

PART I.

GENERAL SERVICES.

Subject to the control and direction of your Company, through its Board of Directors and proper officers, we will undertake to render the following services as they may be requested by you:

Executive Officers

A. Our Executive Officers will serve your Company on major problems which may arise in connection with the affairs and management of your Company.

Officers for Operating Company

b. We will assign certain of our Executive Officers or other members of our staff to serve as officers of your company, to the extent that the duties of such officers can be performed in New York City and through occasional visits outside of New York.

Fiscal Services

c. We will assist your company in regard to its financial resources and obligations, the formulation of its financial program and the securing of and arranging for loans.

Securities

d. We will serve in connection with the issuance of stocks, bonds, notes and other securities of your Company, will take charge of the drafting and printing of mortgages and trust agreements, the drafting and engraving of bonds, notes, stock certificates and other securities, and will arrange for the appointment of trustees, registrars and transfer agents and other like matters in connection with the issuance of the securities of your company. We will also provide for the safe-keeping of securities placed in our custody.

Care and Disbursement of Funds

e. We will, to the extent that your desire, arrange for the deposit of funds of your company kept in New York and the proper use of the same. When proper authority is given, we will receive and disburse funds on behalf of your company, including the payment of dividends, and will, in connection with such payments, secure and maintain lists of stockholders, prepare and file reports to the Federal Government and do all other incidental things in connection therewith; and we will likewise handle or supervise the payment from New York of interest on interest-bearing obligations.

Accounting and Auditing

f. We will supervise the accounting methods and procedure of your company, check its financial reports and supervise and assist in the preparation of its Federal, State and Municipal reports. We will also furnish your company with statements and analyses of its business and operations.

Corporate Matters

g. We will serve your company in regard to corporate matters and will supervise and assist in the preparation of corporate reports.

Corporate Meetings

h. We will attend to or assist in holding meetings of stockholders, of the Board of Directors and of the Executive Committee of your company, will prepare a program of matters requiring action at such meetings and will keep records in connection therewith, including notification to the proper parties of action taken.

Law Matters

i. We will administer the law work of your company insofar as such work is done in New York. We will supervise and assist in preparing, executing, delivering and filing or recording contracts, mortgages and similar instruments of finance and other documents duly authorized, and also in questions which may arise thereunder with trustees, transfer agents, registrars, etc.

Taxation

j. We will serve in preparing and filing Federal and State tax returns of your company and, when necessary, our representatives will, in your company's interest, appear before the tax authorities.

PART II.

SPECIAL SERVICES.

In consideration of our employment by you on the basis and for the purposes set forth under Part I of this Proposal, we will hold ourselves in readiness at all times to furnish

your company when requested, with the following Special Services:

Sale of Securities

k. We will take full charge (subject at all times to direction of your Board) of the sale, for your account, to investment bankers and other similar agencies for distribution, of all securities issued and owned by your company, including negotiations in connection therewith, and we will endeavor to maintain a favorable subsequent market for securities so sold, in order to make it possible for your company to obtain advantageous terms in connection with later issues of its securities. We will also supervise consumers' campaigns for the sale of your Capital Stock to consumers, employees and others in the territory served by subsidiaries of your company.

In connection with the sale of and market for such securities, we will prepare and issue reports, statements, circulars and general data in regard to the business and properties of your company for the information of investment bankers, the press, the general public, commissions and other public authorities.

For these services we are to receive the following commissions:

Bonds, Notes and Similar Obligations.	Percent. of Principal Amount Sold.
(a) In connection with original negotiations and sales under which a new mortgage or other similar instrument prepared by us under our direction is created or to be created covering such issue	1½
(b) For sales under an existing mortgage or other similar instrument which involve an	

original negotiation by us because of change of buyers or otherwise	1
(c) Subsequent to the original negotiations and sale under (a) or (b) above and on all additional sales of bonds, notes and other obligations issued under the same mortgage or other instrument and sold to the same buyers with whom we made the original negotiations under (a) or (b) above	½

On the sale of bonds, notes or other obligations which by their terms will mature in less than ten (10) years from the date of sale an equitable reduction of the charges set forth above will be made by us depending on the particular circumstances involved.

Non Par Value Capital Stock.	Dollars Per Share
Sales in consumers' campaigns or of issues or parts thereof	2

The foregoing commission for the sale of non par value Capital Stock applies only to shares sold at not less than $80.00 per share. The commission on shares sold at less than $80.00 per share will be fixed by agreement according to the circumstances involved in each case.

Par Value Capital Stock:

The price to be received for original issue of non par value stock may be fixed with respect to market conditions prevailing at the time of the pro-

posed sale, but the minimum sale price of the original issue of par value stock is generally fixed by statute without regard to market conditions.

In consequence of this fact and the constantly fluctuating difference between par value and fair market value, the terms under which we will negotiate the sale of your par value stock must necessarily be left open for agreement at the time of any proposed sale, with the understanding, however, that our net compensation after costs and expenses incurred by us in effecting the sale will not exceed the same amount per share as the commissions above prescribed for sales of non par value stock.

We are not, however, in the case of either non par value stock or par value stock to receive any commission on account of sale of the same to your company's stockholders under stockholders' rights of subscription or on account of sale of securities to its employees.

Examination and Reports

L. We will furnish your company with the services of engineers, accountants, rate and new business experts, lawyers and other specialists, for the examination of, and report upon new properties, projects or special problems, for which services you are to reimburse us for the cost thereof.

General Compensation

3. For the services to be rendered to you hereunder we are to receive, in addition to the payments specified in Part II above, the sum of $12,000 per annum, plus a sum equal to the difference between (a) the compensation actually received by us for services rendered all your subsidiaries and (b) the compensation we would have received from said subsidiaries if each thereof had entered into an agreement with us in the form attached.

Reimbursement of Expenses

4. Your company is to reimburse us for all expenses incurred by us on its account, including expenses of members of our organization while away from New York City in the service of your company. We are also to be reimbursed for payments advanced by us in connection with purchases made for your company.

Bills

5. Bills for services and for expenses hereunder shall be payable monthly and shall be due in New York funds within ten days after receipt of our statement.

Control of Service

6. All services to be rendered by us hereunder shall be subject to your direction.

Other Services

7. Should you have occasion to call upon us for services not herein contemplated, or through us to arrange for the services of any one else, such services and the compensation therefor shall be subject to arrangement as the occasion may arise.

Termination

8. It is understood that either one of us, by giving sixty (60) days' notice in writing to the other, may terminate this agreement, and it is further understood that the Supervision Agreements to be entered into with your subsidiary companies will be terminable on similar notice, and that whenever this agreement is so terminated you shall, upon satisfying all your obligations hereunder up to the date of such termination, be relieved of further responsibility to us on account of the guaranteed payment of compensation on account of service to subsidiaries as hereinabove set forth.

If you desire to accept this Proposal, please cause it to be executed by your officers thereunto duly authorized, and thereby constitute it an agreement between us, effective as of 1925.

Very truly yours,

ELECTRIC BOND AND SHARE COMPANY,

By .....

ATTEST:

.....

Secretary.

W[illegible] .oposal on this

day of , 1925, to be effective from and as of

, 1925.

ELECTRIC POWER & LIGHT CORPORATION,

By .....

ATTEST:

.....

Secretary.

Gentlemen:

In order to state definitely the terms of our agreement for general supervision and special services to your company, we submit herewith our formal Proposal, which upon acceptance by you will constitute a contract between us for such supervision and services.

The services to which you will become entitled, if you accept our Proposal, are divided generally as follows:

I. GENERAL SUPERVISION SERVICE: The details of this service are set forth in Part I, Sections 1 to 24, inclusive, and the compensation to be paid to us therefor is set forth in Part I, Section 25.

II. SPECIAL SERVICES: These are divided generally into—

(a) *Sale of Securities:* A statement of the services in this connection and our compensation therefor is set forth in Part II, Section 26.

(b) *Special Engineering:* A statement of the services in this connection and our reimbursement for the cost therefor is set forth in Part II, Section 27.

(c) *Construction and Reconstruction:* A statement of the services in this connection and our compensation therefor is set forth in Part II, Section 28.

(d) *Field Audits:* A statement of the services in this connection and our reimbursement for the cost therefor is set forth in Part II, Section 29.

(e) *Examinations and Reports:* A statement of the services in this connection and our reimbursement for the cost therefor is set forth in Part II, Section 30.

III. GENERAL CONDITIONS: A statement of conditions applicable to both General Supervision and Special

Services is set forth in Part III, Sections 31-32-33-34 and 35.

A brief statement describing the organization and scope of operations of Electric Bond and Share Company follows:

The Electric Bond and Share Company has for over fifteen years successfully financed and supervised the operation of public utility companies in the United States. At the present time groups associated with Electric Bond and Share Company include more than 100 companies, with a total invested capital of approximately $650,000,000., and serve a population of 7,200,000.

In order that the many and varied responsibilities incurred in supervising the affairs of these companies and in the performance of service for them may be fulfilled in the best interests of the companies and of the public served by them, Electric Bond and Share Company has developed and maintains as part of its organization a staff of specialists and experts whose services cover every ramification of public utility activities and problems, including financing, operating, legal matters, engineering in all its branches, efficiency and betterment studies, safety studies, construction, purchasing, traffic matters, insurance of all classes, inspection, accounting, appraisals and valuation, rate studies, taxation, public information, customer ownership, public regulation, negotiations with foreign governments, study of company organizations, relations with employees, preparation of statements and reports, development of new business, merchandising, and special studies and investigations.

Public utility companies require special and expert services which can be best supplied by an organization of the character outlined above. Experience has shown that as to any particular company the demands for such services fluctuate so widely from time to time as to make it uneconomical, if not impossible, for each company to maintain a permanent organization to render these services. To meet the combined requirements of this character of a large num-

ber of companies through a coöperative arrangement, one central organization such as ours becomes available to each company at reasonable cost and provides at all times the services of experts who give their whole time to public utility problems of specialized nature and who could not be carried as a part of the Operating Company's regular staff except at prohibitive expense. The entire organization of Electric Bond and Share Company, embracing the following departments and divisions—

Auditing	Insurance
Commercial and Merchandizing	Investigations
Comptroller's	Operating
Construction	Public Relations
Corporation and Law	Purchasing
Efficiency and Betterments	Rate
Engineering	Secretarial
Executive	Securities
Financial	Statistical
Foreign	Traffic
Inspection	Treasury
	Valuation

becomes, in effect, a part of the organization of each company for which it acts.

We hope that the information set forth herein is sufficiently comprehensive and that the attached Proposal will be found acceptable. A duplicate of the Proposal is enclosed for execution and return to this office.

Yours very truly,

ELECTRIC BOND AND SHARE COMPANY,

By .....

PROPOSAL

Gentlemen:

We hereby propose to furnish to your company and its subsidiaries, controlled by ownership or lease, if there be any, the supervision and other services of our organization as hereinafter outlined and described:

PART I.

GENERAL SUPERVISION SERVICE.

A. *Statement of Services to be rendered by Us.*

Subject to the control of your company through its Board of Directors and proper officers, we will undertake to render the following services as they may be requested by you.

Executive Officers

1. Our Executive Officers will serve your company on major problems which may arise in connection with the affairs and management of your company and its properties.

Officers for Operating Company

2. We will assign certain of our Executive Officers or other members of our staff to serve as officers of your company, to the extent that the duties of such officers can be performed in New York City and through visits to your offices and properties.

Operating Committee

3. We will, through our operating specialists and otherwise, keep in close touch with the affairs and problems of your company, and our Operating Committee, composed of one of our Vice Presidents and all of our operating specialists, will consult in regard to the policies and problems of your company and will apply the results of these studies to the requirements of your company.

Sponsors

One or more of our operating specialists will be assigned as Sponsor or Sponsors for your Company

and will be particularly charged with the duty of carefully and systematically scrutinizing performance and operating data and will, along with other members of our organization, be charged with the responsibility for efficient operation and proper development of your properties. In carrying out this responsibility, these Sponsors will spend such time at your office and on your properties as may be necessary.

We will, through these Sponsors and our entire organization advise your company in all matters pertaining to the operation and development of its properties, such as improvements in methods, betterments of the properties and formulation of plans for future development.

Personnel of Operating Organization

4. We will serve you in matters of personnel and organization and will, through our wide acquaintance in the public utility industry, assist in obtaining personnel. We pay special attention to developing men best fitted to fill any and all positions in the public utility field.

Fiscal Services

5. We will serve your company in regard to its financial resources and obligations, the formulation of its financial program, the establishment of credits and the securing of and arranging for loans, and will maintain a system of Annual Budgets providing for such program of extensions and improvements to your company's properties and setting forth such financial requirements as its circumstances may demand.

Securities

6. We will serve in connection with the issuance of stocks, bonds, notes and other securities of your company, will take charge of the drafting and printing of mortgages and trust agreements, the drafting and engraving of bonds, notes, stock certificates and

other securities, and will arrange for the appointment of trustees, registrars and transfer agents and other like matters in connection with the issuance of the securities of your company. We will also provide for the safe-keeping of securities placed in our custody.

Care and Disbursement of Funds

7. We will, to the extent that you desire, arrange for the deposit of funds of your company kept in New York and the proper use of the same. When proper authority is given, we will receive and disburse funds on behalf of your company, including the payment of dividends, and will, in connection with such payments, secure and maintain lists of stockholders, prepare and file reports to the Federal Government and do all other incidental things in connection therewith; and we will likewise handle or supervise the payment from New York of interest on interest-bearing obligations.

Accounting and Auditing

8. We will supervise the accounting methods and procedure of your company, check its financial reports and supervise and assist in the preparation of its Federal, State and Municipal reports. We will also furnish your company with statements and analyses of its business and operations, and will advise and assist in the standardization of accounting methods in the interest of uniform classification of accounts and the application of rulings and decisions of legally constituted accounting authorities.

Corporate Matters

9. We will serve your company in regard to corporate matters and will supervise and assist in the preparation of corporate reports.

Corporate Meetings

10. We will attend to or assist in holding meetings of stockholders, of the Board of Directors and of the Executive Committee of your company, will

prepare a program of matters requiring action at such meetings and will keep records in connection therewith, including notification to the proper parties of action taken.

Law Matters

11. We will administer the law work of your company in so far as such work is done in New York. We will supervise and assist in preparing, executing, delivering and filing or recording contracts, mortgages and similar instruments of finance and other documents duly authorized, and also in questions which may arise thereunder with trustees, transfer agents, registrars, etc.

Business Relations

12. We will serve your company in regard to matters of business policy and as to relations with the patrons of your company, and with your employes. We maintain a department for the collection and digest of the various State Utility Commission laws, and the decisions and regulations of such Commissions; state and federal legislation; court decisions, and trade and technical literature affecting the industry and its problems—all of which we will make available to your company.

Taxation

13. We will serve in preparing and filing the Federal tax returns of your company, and, when necessary, our representatives will, in your company's interest, appear before the Federal tax authorities. We will also advise your company in the preparation of state, county and municipal tax returns, and will keep it informed of decisions, orders and rulings of courts and other authorities with respect to taxation maters.

Insurance, Bonds, etc.

14. We will serve you in matters pertaining to all classes of insurance and in regard to fidelity, surety and other bonds of a similar character.

Rates and Rate-making

15. We will formulate rate schedules for your property and will advise and assist your company in their application, and our rate experts will spend such time at your office and on your properties as may be necessary. We will keep you informed of rate-making developments and our rate department will serve in connection with the handling of rate matters before State and Municipal authorities.

We maintain an extensive record and file of rates in force on public utility properties throughout the country. We make studies and comparisons of these rates and keep informed of decisions, practices and policies in connection with rate making, and will make available to your company such data and information.

New Business Merchandizing and Jobbing

16. We will serve your company in the organization and administration of its New Business, Merchandise and Jobbing Departments and in regard to the systematic and profitable conduct thereof, and our New Business and Commercial experts will spend such time at your office and on your properties as may be necessary. In connection with such matters, we keep informed of the methods, experience and policies of various operating companies and in touch with manufacturers of electric and gas appliances and apparatus, and with other sources of information. The data and information thus obtained will be made available to your company.

Statistical

17. We will gather, compile and furnish to your company valuable statistical information. We regularly compile comparative tables and charts of financial, business and operating statistics of companies supervised by us and of other public utilities, and information and data of this character will be furnished or made available to your company.

Engineering

18. We maintain a complete staff of electrical, mechanical, steam, civil, hydraulic, gas refrigeration, electric railway, construction and efficiency engineers, together with an extensive auxiliary organization. We keep informed of developments in the technical and engineering art affecting construction and operation of public utility properties and perform investigation and research work in connection therewith, and we maintain contact with the proceedings and activities of engineering societies and other technical bodies and of Federal and State governmental departments and authorities concerned with the development or regulation of public utility properties where involving technical or engineering considerations.

Our engineering staff will be available in New York to your company for consultation and advice in connection with the operation of your properties, improvements and extensions thereof and the planning of future developments. We will advise in connection with cost estimates and designs prepared by your company and will assist in the application to its properties of standardized designs and types of construction devised to promote efficiency of operation and economy of cost. We will scrutinize data received from your company and will offer recommendations for effecting improvements in efficiency and economies in operation. We will supervise the maintenance by your company of such technical and cost records in regard to its properties and their operation as may be necessary or desirable for checking performance, effecting improvements and planning future development.

Technical Information

19. We maintain a general engineering and technical information service through which we will transmit to your company information and data collected from the various companies for which we act

and from other public utility properties, from technical societies and governmental departments and from our own investigations.

Purchasing

20. We will serve your company in matters pertaining to purchasing and, where purchases can be made more advantageously by us than by your organization, we will conduct such purchases and will fulfill all functions of a purchasing organization in so far as can be done in our New York office. For purchasing in connection with construction work, see Section 28.

We maintain an information service through which we will transmit to your company information in regard to market conditions and other matters pertaining to purchasing.

Quantity Purchases

21. We regularly negotiate and place blanket contracts and orders for equipment, material, supplies, etc., generally used by public utilities, and the requirements of your company will be included therein, thereby gaining for you the benefits of favorable discounts, prices and deliveries obtainable through large combined purchases and close contact with market conditions.

Apparatus Exchange

22. We conduct for the benefit of all operating companies for which we act an Apparatus Exchange for the sale or purchase of new or second-hand apparatus and materials. This Apparatus Exchange keeps in touch with other utility companies and with the general second-hand market.

Traffic

23. We will serve your company in matters pertaining to transportation of materials and supplies, and will route and classify shipments supplied against contracts or purchase orders placed for it. We will furnish information concerning classifica-

tion and routing of commodities, insurance in transit, freight rates, proper procedure in the filing of freight claims and the checking and auditing of transportation invoices, etc.

Factory Matters

24. We will serve your company in matters pertaining to factory production, shipments, etc., of materials and apparatus ordered for your account and will give information as to the status of factory work, measures to hasten production, and, when necessary, substitutions or changes in such orders which may improve deliveries or quality of material. For factory inspection, etc., see Section 27.

Compensation to be Paid to Us for Supervision Service.

25. For services covered in the preceding Section 1 to 24, both inclusive, we are to receive the following compensation on the gross earnings of your company:

2.	% of the	first	$1,000,000	of annual	gross	earnings.	
1.9%	"	" next	2,000,000	"	"	"	"
1.8%	"	" "	4,000,000	"	"	"	"
1.7%	"	" "	6,000,000	"	"	"	"
1.6%	"	all over	13,000,000	"	"	"	"

In the event that your Company controls, by stock ownership or lease, a subsidiary Company or subsidiary Companies, earnings made in inter-company transactions shall be eliminated in computing the gross earnings on which the compensation hereunder shall be calculated.

SPECIAL SERVICES

In consideration of our employment by you on the basis and for the purposes set forth under Part I of this Proposal, we will hold ourselves in readiness at all times to furnish your company when requested, with the following special services:

Sale of Securities

26. We will take full charge (subject at all times to direction of your Board) of the sale, for your account, to investment bankers and other similar agencies for distribution, of all securities issued and owned by your company, including negotiations in connection therewith, and we will constantly endeavor, through all of the facilities at our command, including our extensive connections with investment bankers and other similar agencies, to maintain a favorable subsequent market for securities so sold, thereby making it possible for your company to obtain advantageous terms in connection with later issues of its securities. We will also supervise consumers' campaigns for the sale of your capital stock to consumers, employees and others in the territory served by your company.

In connection with the sale of and market for such securities, we will prepare and issue reports, statements, circulars and general data in regard to the business and properties of your company for the information of investment bankers, the press, the general public, commissions and other public authorities.

For these services we are to receive the following commissions:

Bonds, Notes and Similar Obligations	Percent of Principal Amount Sold
(a) In connection with original negotiations and sales under which a new mort-	

Bonds, Notes and Similar Obligations	Percent of Principal Amount Sold
gage or other similar instrument prepared by us or under our direction is created covering such issue	1½
(b) For sales under an existing mortgage or other similar instrument which involve an original negotiation by us because of change of buyers or otherwise	1
(c) Subsequent to the original negotiations and sale under (a) or (b) above and on all additional sales of bonds, notes and other obligations issued under the same mortgage or other instrument and sold to the same buyers with whom we made the original negotiations under (a) or (b) above	½

On the sale of bonds, notes or other obligations which by their terms will mature in less than ten (10) years from the date of sale an equitable reduction of the charges set forth above will be made by us depending on the particular circumstances involved in each case.

Non Par Value Capital Stock	Dollars Per Share
Sales in consumers' campaigns or of issues or parts thereof	2

The foregoing commission for the sale of non par value capital stock applies only to shares sold at not less than $80.00 per share. The commission on shares sold at less than $80.00 per share will be fixed by agreement according to the circumstances involved in each case.

Par Value Capital Stock:

The price to be received for original issue of non par value stock may be fixed with respect to market conditions prevailing at the time of the proposed sale, but the minimum sale price of the original issue of par value stock is generally fixed by statute without regard to market conditions.

In consequence of this fact and the constantly fluctuating difference between par value and fair market value, the terms under which we will negotiate the sale of your par value stock must necessarily be left open for agreement at the time of any proposed sale, with the understanding, however, that our net compensation after costs and expenses incurred by us in effecting the sale will not exceed the same amount per share as the commissions above prescribed for sales of non par value stock.

We are not, however, in the case of either non par value stock or par value stock to receive any commission on account of sale of the same to your Company's stockholders under stockholders' rights of subscription or on account of sale of securities to its employees.

Special Engineering

27. We will undertake any special engineering work which your company may require (in addition to advice and consulting assistance as specified in Part I hereof), such as preparation of designs, specifications and estimates for new developments and

for improvements or extensions to properties; investigations in regard to future development and important problems of construction, and detailed efficiency and betterment studies and experiments for the purpose of effecting improvements in methods of operation or character of service.

We will inspect materials and equipment for your company and make necessary examinations and tests in connection therewith.

For these special services you are to reimburse us for the cost thereof.

Construction and Reconstruction

28. We will, when authorized by separate agreement, procure ..... or other responsible contractor to do for your company construction or reconstruction work of any character or magnitude. So long as a construction organization is continuously maintained by such contractor on your property, new jobs may be added to existing contract as supplementary to it. Whenever the construction organization has, in its entirety, been withdrawn from your property, any work requiring its return must be covered by a new contract.

The services which will be performed in connection with such work will include organization and direction of the construction operations, field engineering, purchasing materials and equipment, obtaining construction superintendents, assembling the necessary construction forces and construction plant, keeping proper records and books of account and all other things necessary or incidental to consummation of the work.

For such construction or reconstruction work you are to reimburse to the contractor his disbursements and costs in connection therewith, and pay to

such contractor a fee based upon a percentage of the entire cost of each contract, as follows:

5% of the first $200,000;
4½% " " next 800,000;
4% " all additional cost.

Field Audits

29. We will furnish your company (in addition to advice and consulting assistance as provided in Part 1 hereof) with the services of auditors and accountants expert in public utility matters for the auditing of your books, accounts and other records, for which services you are to reimburse us for the cost thereof.

Examinations and Reports

30. We will furnish your company with the services of engineers, accountants, rate and new business experts, lawyers and other specialists, for the examination of, and report upon new properties, projects or special problems, for which services you are to reimburse us for the cost thereof.

PART III.

GENERAL CONDITIONS.

Reimbursement of Expenses

31. Your company is to reimburse us for all expenses incurred by us on its account, including expenses of members of our organization while away from New York City in the service of your company. We are also to be reimbursed for payments advanced by us in connection with purchases made for your company.

Bills

32. Bills for services and for expenses hereunder shall be payable monthly and shall be due in New York funds within ten days after receipt of our statement.

Control of Service

33. All services to be rendered by us hereunder shall be subject to your direction.

Other Services

34. Should you have occasion to call upon us for services not herein contemplated, or through us to arrange for the services of any one else, such service and the compensation therefor shall be subject to arrangement as the occasion may arise.

Termination

35. This agreement may be terminated by either party at any time on 60 days' written notice.

If you desire to accept this Proposal, please cause it to be executed by your officers thereunto duly authorized, and thereby constitute it an agreement between us, effective as of 192 .

Very truly yours,

ELECTRIC BOND AND SHARE COMPANY,

By .....

ATTEST:

.....

Secretary

WE HEREBY ACCEPT the above Proposal on this .....

..... day of ..... 192 , to be effective from and as of ..... 192 .

.....

By .....

ATTEST:

.....

Secretary

COMMISSION'S EXHIBIT 174

[From Frank Silliman, Jr., Vice President of Electric Bond and Share Company]

January Thirteenth
1928

Mr. Guy W. Talbot, President
Northwestern Electric Company
Public Service Building
Portland, Oregon

Dear Mr. Talbot:

I am just in receipt of your letter of the 6th inst. about the Supervision Agreement between Northwestern Electric Company and Electric Bond and Share Company.

The effect of the Supervision Agreement will be to add in 1928 approximately $1400.00 per month to the Operating Expenses of the Company and about $4250.00 per month to the Fixed Capital Account through Construction. This is not an onerous burden upon the Company and should be readily absorbed in the natural growth of the Company's business.

We have already waited about three years before making this Agreement and directly after our talk about it when you were in New York, I told Mr. Mitchell that we were going to make this Agreement, effective January 1st, and, a few days ago, I told Mr. Groesbeck that we would take it on the books of Electric Bond and Share Company from January 1st. I dislike to go back to them again about this as they have for a long time felt that the contract should be made.

I hope, therefore, that you will put it through as we planned when you were in New York, and to that end I am enclosing three (3) copies of the Agreement—two of which are executed on behalf of Electric Bond and Share Company, and one copy is for your office files. When the Agreement has been executed by the Northwestern Electric Com-

pany will you please send one copy to me? I suggest that you accrue for the fee on the books of Northwestern Company from January 1st, 1928 and charge 25% of it to the proper General Expense Account and 75% to Construction.

I am also sending to you, in accordance with my promise when you were here, a memorandum showing the method employed by the Kansas Gas and Electric Company in the distribution of the fee on its books between Construction and Operating Expenses. We think this is quite a satisfactory method, but you may be able to improve upon it and, if so, I would like to know what your ideas are of a better method. The Kansas method averages about 25% to Expenses and 75% to Construction in its case.

I appreciate that the Companies are going to have some temporary additional burden on account of the new office building not being fully rented, but I think you will promptly overcome this by renting the space and will, in some degree, offset this by the economies growing out of having all of your Companies in one location.

I am looking forward to seeing Mr. Platt when he comes to New York after you have settled yourself in the new building.

With kind regards, I am

Yours very truly,

FRANK SILLIMAN, JR.

FSJr/V.
Attach.

COMMISSION'S EXHIBIT 181

UTAH POWER & LIGHT COMPANY
Kearns Building
Salt Lake City, Utah

May 1, 1928

Ralph B. Feagin, Esq.,
Electric Bond and Share Co.,
2 Rector St., New York, N. Y.

Dear Mr. Feagin:

This is to acknowledge your letter of April 14th, with enclosed drafts of service contracts (a) with operating public utility companies and (b) with holding companies.

I have no further suggestions with respect to the contract with operating public utility companies. With respect to the holding company contract, I would not venture to make any suggestions had you not expressly requested them, as the matters involved are beyond the scope of my duties and experience. Since you have requested my views, however, I may say frankly that I do not like that portion of the contract which relates to "Services for Operating Subsidiaries." I refer particularly to the paragraph under this caption on the first page, to paragraph numbered 15 on page 4, to paragraph 16 on page 4, and to paragraph (a) under caption, "Non Par Value Capital Stock." Possibly, also, if my criticism has any merit, some change in the language of paragraph 22 under Part III on page 8 should also be made.

My principal and primary objection to these paragraphs is directed to the paragraph on the first page, "Services for Operating Subsidiaries." This paragraph expressly contemplates that the holding company, which, of course, has control of the operating subsidiary, shall procure that subsidiary to make a service contract with the Electric Bond and Share Company. This destroys the theoretical freedom of action of the local operating company, which it

seems to me is an important point in the investigation of these contracts by local public service commissions. We have always stressed the point in discussion of these matters before local commissions that these contracts are voluntarily entered into after full discussion by the local Boards of Directors as being for the best interests of the local companies; that they are terminable at will by those local companies, and that they constitute an asset of value to those companies for which the compensation is justified, and without the payment of which compensation by the local companies the services of the Electric Bond and Share Company could not be obtained.

This paragraph of the proposed contract, while it does not so state, leaves it clearly open to inference that the holding company will see to it that the operating company makes such a contract. The holding company will obviously do so in its own interest because otherwise—while in form it is optional—it would doubtless be required to itself assume the payments to be made by the operating company in order to secure those services for that company. Furthermore, the contract discloses on its face that it is not necessary for the operating company to make these payments to secure these services for if it does not do so the holding company will assume such payments and the operating company get the benefit of the services for nothing. I think from the standpoint of justification before local commissions that this paragraph materially weakens the setup presented by the present existing and proposed draft operating service contracts.

I have nothing particular to suggest in lieu of this paragraph except its virtual elimination. It would seem to me that it might be safely assumed by the Electric Bond and Share Company that when it contracts with holding companies that the operating subsidiaries will make service contracts, and the Electric Bond and Share Company, of course, has the privilege of refusing the contract of the holding company if the operating companies do not make such

contracts. If the above general criticism is sound, would it not be sufficient to put in a brief paragraph under this heading, "Services for Operating Subsidiaries," to the effect that the Electric Bond and Share Company has made, or there are in progress of negotiation, contracts with the operating subsidiaries for the services mentioned in "The Service Contract with Operating Public Utility Companies," and that the services to be rendered under the holding company contract are in addition to, and not a part of, the services under the contract with the operating companies.

My objection to paragraph 15 on page 4 is related to the above objection. It is simply to the psychological or I might say political effect of the superimposition of an additional fee based on gross earnings of subsidiaries over and above the fee charged to the subsidiaries likewise based on gross earnings. This objection may or may not be valid. It would seem to be more consistent if the percentage were higher and based upon the earnings of the holding company alone, so as to divorce the holding company from the operating company. Another suggestion would be that the contract with the holding company be renewed annually and a lump sum compensation for the ensuing year stated in the contract, which compensation might be based upon the percentage which is now set forth in said paragraph 15, as determined by the last year's earnings. I do not know that this criticism is really a serious one, but I am giving you the reaction which I had to a reading of the section.

Paragraph 16 on page 4 should be eliminated if the above generally stated objection is sound.

My criticism of paragraph (a) under the caption, "Non Par Value Capital Stock," on page 6, is simply to the use of the words, "territory served by your system." This identifies the holding company directly with the operating subsidiaries. Would it not be better to say "to the territory served by any of your operating subsidiaries."

In paragraph 22 on page 8 the only suggestion I have would be to eliminate the words in line 2, "or its operating subsidiaries."

I assume that this holding company contract will become virtually public property, either through the Federal Trade Commission investigation, or otherwise, and may in that way come to the potential notice at least of all local public utility commissions. It is for this reason that I think it quite important that the holding company contract should be divorced as completely as possible from the operating company contract so as to relate solely to the services rendered to the holding company, which do not involve the operating company in any way, and thus not become the subject of inquiry, explanation, or justification, in local investigation.

Very truly yours,

JOHN F. MACLANE,
Vice Pres. & General Counsel

JFM-O

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Vol. IV

TRANSCRIPT OF RECORD

(Pages 867 to 901)

Supreme Court of the United States

OCTOBER TERM, 1944

No. 6

AMERICAN POWER & LIGHT COMPANY,
PETITIONER,

vs.

SECURITIES AND EXCHANGE COMMISSION

No. 7

ELECTRIC POWER & LIGHT CORPORATION,
PETITIONER,

vs.

SECURITIES AND EXCHANGE COMMISSION

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONS FOR CERTIORARI FILED JUNE 16, 1944.

CERTIORARI GRANTED MAY 28, 1945.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No.

AMERICAN POWER & LIGHT COMPANY,
PETITIONER,

vs.

SECURITIES AND EXCHANGE COMMISSION

No.

ELECTRIC POWER & LIGHT CORPORATION,
PETITIONER,

vs.

SECURITIES AND EXCHANGE COMMISSION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

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[fol. 867]

IN UNITED STATES CIRCUIT OF APPEALS FOR THE FIRST CIRCUIT

October Term, 1943

No. 3823

AMERICAN POWER & LIGHT COMPANY, Petitioner,

vs.

SECURITIES AND EXCHANGE COMMISSION, Respondent.

No. 3824

ELECTRIC POWER & LIGHT CORPORATION, Petitioner,

vs.

SECURITIES AND EXCHANGE COMMISSION, Respondent.

DOCKET ENTRIES

On November 30, 1942, a stipulation for the consolidation of the transcripts of record in these proceedings was filed and approved by the Court.

Thereafter, on January 15, 1943, a stipulation that certain corrections be made in the transcript of testimony was filed and approved.

Thereafter, on January 25, 1943, a stipulation designating the portions of the original transcript of record to be printed was filed and approved.

[fol. 868] Thereafter, on April 13, 1943, a stipulation that documents designated as "Respondents' Exhibits 71-AA and 71-AAX and Exhibit F to Annual Supplement on Form U5S of Electric Bond and Share Company for the year ended December 31, 1939", be filed and become a part of the transcript of record, was filed and approved.

Thereafter, on May 3, 1943, upon motion, leave was granted respondent to print and file designated supplemental portions of the transcript.

Thereafter, on June 1, 1943, these cases came on to be heard, and were fully heard by the Court, Honorable

Calvert Magruder, Honorable John C. Mahoney and Honorable Peter Woodbury, Circuit Judges, sitting.

Thereafter, on March 17, 1944, the following Opinion of the Court was filed:

[fol. 869] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

October Term, 1943

No. 3823

AMERICAN POWER & LIGHT COMPANY, Petitioner,

vs.

SECURITIES AND EXCHANGE COMMISSION, Respondent.

No. 3824

ELECTRIC POWER & LIGHT CORPORATION, Petitioner,

vs.

SECURITIES AND EXCHANGE COMMISSION, Respondent.

PETITIONS FOR REVIEW OF ORDERS OF THE SECURITIES AND EXCHANGE COMMISSION

BEFORE MAGRUDER, MAHONEY AND WOODBURY, JJ.

JOHN F. MACLANE,
FRANK A. REID,
ARTHUR A. BALLANTINE,
for AMERICAN POWER & LIGHT CO.,
Petitioner.

BOYKIN C. WRIGHT,
R. GRAHAM HEINER,
DANIEL JAMES,
WRIGHT, GORDON, ZACHRY, PARLIN & CAHILL,
WALLACE P. ZACHRY,
JOHN F. MACLANE,
FRANK A. REID,
for ELECTRIC POWER & LIGHT CORPORATION,
Petitioner.

JOHN F. DAVIS,
for Respondent.

[fol. 870] OPINION OF THE COURT

March 17, 1944

MAGRUDER, J. These cases come here on petitions of American Power & Light Company (hereinafter refefred to as American) and Electric Power & Light Corporation (hereinafter referred to as Electric), both companies being Maine subholding company subsidiaries of Electric Bond & Share Company (hereinafter referred to as Bond & Share), for review of orders of the Securities and Exchange Commission dated August 22, 1942, requiring the dissolution of the two petitioners. The petitions for review were filed under § 24 (a) of the Public Utility Holding Company Act of 1935, 49 Stat. 834.

The orders were issued pursuant to § 11 (b) (2) of the Act on the basis of a finding by the Commission "(1) that the corporate structures and continued existence of American and Electric unduly and unnecessarily complicate the structure of the Bond and Share system and unfairly and inequitably distribute voting power among the security holders of such system; (2) that to effectuate the statutory requirements it is necessary that American and Electric be dissolved." In the case of American the order under review provided, *inter alia*:

"It is further ordered pursuant to Section 11 (b) (2) of the Public Utility Holding Company Act of 1935 that the existence of American Power & Light Company shall be terminated and that said company shall be dissolved;

"It is further ordered that respondent American Power & Light Company and respondent Electric Bond and Share Company shall proceed with due diligence to submit to this Commission a plan or plans for the effectuation of this order, and shall take such other and further steps as may be necessary or appropriate to effectuate this order; * * *"

An order in corresponding terms was directed against Electric.

[fol. 871] Relevant portions of § 11 of the Act are copied in the footnote.[1]

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[1] "Sec. 11. (a) It shall be the duty of the Commission to examine the corporate structure of every registered holding company and subsidiary company thereof, the re-

[fol. 872] Section 11(b)(2) makes it the duty of the Commission, as soon as practicable after January 1, 1938:

"To require by order, after notice and opportunity for hearing, that each registered holding company, and each [fol. 873] subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company [fol. 874] in the holding-company system does not unduly

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lationships among the companies in the holding-company system of every such company and the character of the interests thereof and the properties owned or controlled thereby to determine the extent to which the corporate structure of such holding-company system and the companies therein may be simplified, unnecessary complexities therein eliminated, voting power fairly and equitably distributed among the holders of securities thereof, and the properties and business thereof confined to those necessary or appropriate to the operations of an integrated public-utility system.

"(b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

"(1) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system: *Provided, however,* That the Commission shall permit a registered holding company to continue to control one or more additional integrated public-utility systems, if, after notice and opportunity for hearing, it finds that—

"(A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;

"(B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country; and

or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system."

Acting under that authority the Commission instituted the present proceeding on May 9, 1940, by the entry of notice and order for hearing, naming as respondents Electric Bond & Share, several subholding company subsidiaries of Electric Bond & Share (including the two peti-

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"(C) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation. The Commission may permit as reasonably incidental, or economically necessary or appropriate to the operations of one or more integrated public-utility systems the retention of an interest in any business (other than the business of a public-utility company as such) which the Commission shall find necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems.

"(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission

tioners), and Ebasco Services, Inc. The order specified that the hearing was to determine whether it was necessary to discontinue the existence of or modify the corporate structure of, or redistribute the voting power among security holders of, Bond & Share or any of the other respondents and "what further action, if any, is necessary and shall be required to be taken by the respondents herein, or any of them, to ensure that the corporate structure or continued existence of any of the respondents herein does not unduly

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to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company. The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist. Any order made under this subsection shall be subject to judicial review as provided in section 24.

"(c) Any order under subsection (b) shall be complied with within one year from the date of such order; but the Commission shall, upon a showing (made before or after the entry of such order) that the applicant has been or will be unable in the exercise of due diligence to comply with such order within such time, extend such time for an additional period not exceeding one year if it finds such extension necessary or appropriate in the public interest or for the protection of investors or consumers.

(d) The Commission may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce compliance with any order issued under subsection (b). In any such proceeding, the court as a court of equity may, to such extent as it deems necessary for purposes of enforcement of such order, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction, in any such proceeding, to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer under the direction of the court the assets so possessed. In any proceeding for the enforcement of an order of the Commission issued under subsection (b), the trustee with the approval of the court shall have power to dispose of any or all of such assets and,

or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of the holding company system of Electric Bond and Share Company." On June 7, 1940, the Commission entered an order that the hearing "shall be limited initially to the issue of whether it is necessary to discontinue the existence of American Power & Light Company [or] Electric Power & Light Corporation . . . in order to insure that the structure of the holding company system of Electric Bond and

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subject to such terms and conditions as the court may prescribe, may make such disposition in accordance with a fair and equitable reorganization plan which shall have been approved by the Commission after opportunity for hearing. Such reorganization plan may be proposed in the first instance by the Commission, or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization.

"(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropiate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plain as fair and equitable and as appropriate to effectuate the pro-

[fol. 875] Share Company shall not be unduly or unnecessarily complicated and that voting power shall not be unfairly or inequitably distributed among security holders of such system."[2]

The hearing opened on June 18, 1940, before an examiner, and extended over a period of two years. A voluminous record was made, comprising over 18,000 pages of testimony and more than 1,500 exhibits.

Copies of the Commission's proposed findings opinion and order were exhibited to counsel for American and Electric, who thereupon entered into stipulations, reading, in part, as follows:

"And a copy of Commission's proposed findings, opinion and order having been exhibited to counsel for American [Electric];

"And it appearing therefrom that the objections made by respondent American [electric] in motions and exceptions, or otherwise in the record, have been fully presented to and urged before the Commission, and are ruled upon in said findings, opinion and order;

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visions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed."

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[2] This order did not, as petitioners contend, amount to a predetermination by the Commission that elimination of the subholding companies would necessarily have to be the remedy to be applied if it should be found that undue complexity and inequitable distribution of voting power existed in the holding company system. Under the issue as framed it was open to petitioners to make a showing that some other remedy was more appropriate, and that dissolution of American and Electric was not necessary to ensure compliance with § 11(b)(2).

"It is hereby stipulated that respondent American [Electric] through its counsel hereby waives the filing of request for findings, further exceptions to the findings and opinion of the Commission, the filing of briefs and oral argument, but reserves all legal and constitutional rights, including its right to full judicial review of the said findings, opinion and order.

"Subject to the foregoing reservations of rights, it is stipulated that the Commission may proceed to enter its findings, opinion and order without further formality."

[fol. 876] Thereupon, the Commission, on August 22, 1942, formally issued its findings, opinion and orders. Petitions for rehearing were filed on August 27 and denied the next day.

Petitioners seek to raise before us a great many issues, which fall into four basic categories: (1) those raising procedural objections to the orders; (2) those challenging the sufficiency of the evidence to sustain the Commission's ultimate findings; (3) those asserting that the orders are arbitrary and capricious, and (4) those challenging the constitutionality of § 11(b)(2) of the Act. Some of these issues are not properly before us; others have been passed upon by decisions in other circuits and do not need extended discussion.

Section 24(a) of the Act provides that:

"No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do."

Observing this limitation upon our power of review, we must decline to consider the following objection, which the petitioners have presented here but did not urge before the Commission: that § 11(b)(2) does not as a matter of statutory interpretation authorize the dissolution of subholding companies as one method of bringing a holding company system into compliance with that subsection. *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U. S. 253 (1943); *Pacific Gas & Electric Co.* v. *Securities and Exchange Commission*, 127 F. (2d) 378, 386 (C.C.A. 9th, 1942); *Todd* v. *Securities and Exchange Commission*, 137 F. (2d) 475 (C.C.A. 6th, 1943). The last two cases just cited held that § 24(a) would preclude judicial review even of ques-

tions as to the constitutionality of the Act, if such issues were not raised before the Commission. There may be some doubt whether this is so; since an administrative agency necessarily assumes the constitutionality of the statute [fol. 877] under which it operates, it might perhaps be held that this constitutes "reasonable grounds" for the failure to raise constitutional issues before the Commission. However that may be, there can be no doubt that under § 24(a) petitioners were obliged to raise before the Commission issues as to the Commission's statutory authority to issue the contemplated orders. We do not find that the Commission in the course of the proceedings did anything which might be held to constitute a "waiver" of this requirement. The stipulation filed by petitioners just before the formal entry of the orders reserved in general terms all legal and constitutional rights, including the "right to full judicial review of the said findings, opinion and order". This can only mean judicial review according to law. It cannot confer upon us power to review questions which § 24(a) forbids us to review because they were not raised before the Commission.

For the same reason, the following objections, which were not made before the Commission, cannot be considered by us: (1) that petitioners are legally incapable of complying with the order of dissolution because dissolution can be effectuated only by a vote of the stockholders in pursuance of procedure prescribed by state law; (2) that the orders are not in accordance with § 11 (b) (2) in that they fail to prescribe the "steps" which petitioners must take to effectuate compliance with the statutory requirements; (3) that the orders operate in effect to deprive petitioners of the benefit of the one-year period granted by § 11 (c) within which to comply with the orders.

Petitioners refer to the direction in § 11 (b) (2) that the Commission shall proceed thereunder "as soon as practicable after January 1, 1938", and object that the orders should not have been made since it is not "practicable" at this time "to require the acts provided for therein, in view of the effect of the present emergency created by the war, including the depressed condition of [fol. 878] financial markets and the present uncertainties and difficulties of our national economy." This objection is sufficiently answered in *Todd* v. *Securities and Ex-*

change Commission, 137 F. (2d) 475, 479 (C. C. A. 6th, 1943):

"Petitioner urges that the issuance of the order at the present time is 'impracticable', due to war conditions and their effect upon the business of the System. But the statute, while providing due protection for investors, has not made convenience for the holding company the test of statutory practicability. The term 'as soon as practicable' clearly means that the action contemplated by the statute shall be taken 'as soon as practicable' for the Commission."

Section 11 (a) contemplates that the Commission shall make studies of each registered holding company and subsidiary to determine the extent to which the corporate structure of such holding company system may be simplified, unnecessary complexities therein eleminated, voting power fairly and equitably distributed and the properties and business thereof confined to those necessary or appropriate to the operations of an integrated public utility system. It is then the Commission's duty "as soon as practicable" to proceed under § 11 (b). It is fully apparent from the record that the Commission made a preliminary examination of the Bond & Share system. The Commission's notice and order for hearing in the present proceedings stated at the outset:

"The Commission having examined the corporate structure of Electric Bond and Share Company, a registered holding company, and its subsidiary companies, the relationships among the companies in the holding company system of said Electric Bond and Share Company, the character of the interests thereof and the properties owned or controlled thereby, and the Commission having reasonable grounds to believe that * * *" (Then follows a detailed description of the history, structure and property of the system and an assertion of the Commission's belief that the system is not in compliance with the requirements of § 11 (b) (2)).

[fol. 879] It is argued that the Commission was required to institute and complete proceedings under § 11(b)(1) looking toward the integration of the operating subsidiaries before it was authorized to enter an order in § 11(b)(2) proceedings. This argument was rejected, and, we think,

correctly, in *Commonwealth & Southern Corp.* v. *Securities and Exchange Commission*, 134 F. (2d) 747, 754 (C. C. A. 3d, 1943), where the court said:

"The final assignment of unfairness is based upon the fact that the Commission failed to consider the effect of any orders which may hereafter be made by it in the proceedings under section 11(b)(1). There is, however, no direction in the act as to whether proceedings under section 11(b)(1) or under section 11(b)(2) should be first determined. The order of procedure is left entirely to the discretion of the Commission. We may not interfere with the exercise of its discretion in this case."

A similar objection is based upon the refusal of the Commission to grant motions by the petitioners, made in December, 1941, to consolidate the hearings on plans submitted by the petitioners under § 11(e) with the present § 11(b)(2) proceedings. On July 23, 1941, American had filed with the Commission an application for approval by the Commission of a detailed plan of reorganization purporting to bring the company into compliance with the requirements both of §§ 11(b)(1) and 11(b)(2) of the Act. Electric had filed a similar application on December 3, 1941. In explaining its reasons for denying the motions to consolidate, the Commission stated that hearings on the § 11(e) plans would unduly prolong the § 11(b)(2) proceedings and it pointed out certain defects appearing on the face of the plans which, in the judgment of the Commission, would render them wholly inadequate to accomplish their purported purpose of meeting the statutory requirements. Further, the Commission stated:

"We regard as wholly untenable respondents' contention [fol. 880] that in carrying out our duties under Section 11 we cannot find 'necessary' a course of action for which some alternative may be present, since such a construction would lead to the result that we should be rendered impotent to order *any* action where several courses of action appeared available to achieve the statutory objectives. On the basis both of plain logic and the basic principles of statutory construction, we deem it indisputable that the steps or action we must find 'necessary' within the meaning of Section 11 are such as seem to us designed to *ensure* effectuation of the provisions of the Section *most effectively and promptly*."

We find nothing in § 11 which would require the Commission, before issuing any order under § 11(b)(2), to hold a hearing on applications tardily filed by the companies under § 11(e). Under the circumstances we hold that the Commission did not abuse its discretion in denying the motions to consolidate. And see *Commonwealth & Southern Corp.* v. *Securities and Exchange Commission, supra,* at p. 754.

The Commission pointed out that its orders under § 11 (b)(2) did not exclude the possibility that American and Electric might actually proceed to reconstitute themselves and their systems in such manner that dissolution would no longer be necessary to "ensure" compliance with the statutory requirements. In that event the Commission is empowered by § 11(b) to "revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist."

We proceed to review, at not too great length, the ultimate statutory findings by the Commission upon which its orders were predicated.

The Commission sets forth with a wealth of detail the history of the organization, development, capitalization and structure of the Bond & Share system, and the role of the present petitioners therein. The subsidiary facts are not really in dispute, though petitioners challenge certain of the Commission's inferences and conclusions therefrom.

[fol. 881] The Bond & Share system is a pyramid-like structure of which Bond & Share itself constitutes the apex, a number of subholding companies (including American and Electric) form an intermediate tier, and over two hundred direct and indirect subsidiaries of the latter form the base. In respect of capitalization and assets, number of customers and geographical area served, and quantity of electricity generated and gas sold, the Bond & Share system constitutes the largest single public utility holding company system registered under the Act.

Bond & Share owns securities in American representing 20.7% of the total voting power. It owns securities in Electric representing 46.8% of the total voting power. Quite apart from the statutory presumption in §§ 2(a)(7) and 2(a)(8), it is clear and undisputed that Bond & Share controls American and Electric, and that such control pervades the whole of these subholding company systems in a most comprehensive manner.

The general pattern followed by Bond & Share in developing its system through the instrumentality of subholding companies is described by the Commission, with much supporting detail, as follows:

"• • • assets were placed on the books of the subholding companies at sums considerably in excess of their cost to Bond and Share and its associates in the particular venture (the 'syndicate'); the subholding company would then issue to Bond and Share and associates senior securities (either notes or preferred stock) in a face amount more than sufficient to cover the cost of the assets turned over to the subholding company, and would also issue substantial amounts of common stock (having a majority of total voting power) against the company's inflated investment account. Bond and Share and associates would sell to the public the senior securities plus a bonus of common stock, for the approximate face amount of the senior security, thereby recouping all cash outlays; the promoters would then be left with substantial blocks of common stock at no cash cost (sometimes indeed with a cash profit) which they would divide [fol. 882] among themselves, the lion's share always going to Bond and Share as 'manager' and promoter of the venture. Thus, Bond and Share would emerge with a substantial block of voting stock at no cost, and complete control of the new corporation (and its subsidiaries) assured through the concentrated voting strength of its common stock holdings and the execution of Bond and Share's standard 'service contract' whereby Bond and Share employees 'officered' the company, formed more than a majority of its board, and 'took over the management of the company and its subsidiaries'.

"As a corollary to this method of financing the subholding companies, there also invariably resulted a serious inflation in the accounts of the operating company subsidiaries which were set up. Since the assets received at organization by the subholding companies were generally entered in their book accounts at inflated figures, they were transferred by the subholding companies to the operating companies at sums embodying at least an equivalent amount of inflation and sometimes a greatly increased amount. In this way there was passed over to the consumer the burden of supporting the watered capitalization of both operating company and the subholding company, while the public investors

in the securities of the operating company and the subholding company who may have purchased their securities in reliance on balance sheets containing serious inflation were not informed thereof."

American was organized by Bond & Share in 1909. After reciting the organization steps and methods of financing, the Commission concluded:

"It is thus apparent that Bond and Share had succeeded in realizing for itself complete working control of the new company and better than a 20% equity in it, after recovering every dollar of its investment in the securities transferred to American, plus a cash profit of approximately $120,000. Otherwise stated, Bond and Share had sold out an 80% interest in the aforementioned securities, recovering thereby its entire cost plus a substantial profit without in any way parting with control of such securities or of the properties which they represented. These facts obviously afford some illumination as to the meaning of Bond and Share's executive committee when it authorized the forma- [fol. 883] tion of American 'to minimize the risks and commitments' of Bond and Share.

"The obverse side of the coin must not be overlooked. American had issued $8,000,000 par value of its own securities to acquire $500,000 cash and securities which had recently cost Bond and Share less than $1,700,000. The cash paid over to Bond and Share for the securities and the profits realized by Bond and Share were furnished by the public which purchased American's securities. Nevertheless, control of the company rested firmly in Bond and Share's possession."

In the years following, American enormously expanded its capitalization and holdings. As its succeeding issues of preferred stock to the public diluted somewhat the voting control of Bond & Share, such control was reinforced from time to time by various means, including common stock splitups,[3] and the issuance of additional common stock as divi-

[3] The Commission cites similar instances of common stock splitups in operating companies to reinforce the voting control of the subholding companies over their subsidiaries.

dends on American's outstanding common stock.

Electric was organized by Bond & Share in 1925. The Commission found:

"The outcome for Bond and Share of the organization and financing of Electric was successful beyond all previous similar ventures. For its holdings of Utah Securities Corporation common stock (59,193 shares) representing a cost to Bond and Share of $618,123, it had received $561,930 in cash and 224,772 shares of Electric common. For its basket of other securities transferred to Electric having a cash cost of $19,390,385 it received the equivalent of $25,889,076 in cash plus 50,000 shares of common stock and 353,408 option warrants to buy additional common at $25 per share. Through the various transactions in connection with Electric's organization, Bond and Share acquired an additional 23,569 shares of common at a cost of $36,216 or $1.53 per share. In total, Bond and Share emerged with 298,341 shares of common and 353,408 option warrants at no cost, 9,480 shares of second preferred stock at a cost of $854,904, [fol. 884] and a net cash profit of approximately $6,500,000 on the securities surrendered to Electric, most of which had been held less than two years.

"Not only did Bond and Share acquire its entire initial common stock investment in Electric at a cost of approximately minus $6,500,000, but in customary fashion it also emerged with complete control of the new company."

Though the capitalization of Electric in the succeeding years was, as in the case of American, greatly increased, Bond & Share maintained its control throughout.

Arrearages of cumulative dividends on the preferred stocks of American and Electric have mounted steadily, year by year, since 1932. As of December 31, 1941, such arrearages on the two classes of preferred stock in American amounted to $35,114,788, representing more than three and a half years' requirements on each class. As of the same date, the arrearages on Electric's preferred stock amounted to $50,889,325, representing more than nine years' requirements on its first preferred stock and over ten years' requirements on its second preferred. Notwithstanding this, the Commission pointed out that Bond & Share has continued in full control of petitioners by virtue of the absence from petitioners' charters and bylaws of any provision for increased voting power or other protective fea-

tures for the preferred stocks when dividends are in arrears.[4]

Up until 1935 American organizationally was "scarcely more than a set of books in Bond & Share's office." The same was true of Electric. All officers of petitioners were employees of Bond & Share and paid exclusively by it; neither petitioner had any employees of its own. All cor- [fol. 885] porate activities performed for or in the name of petitioners were performed by employees of Bond & Share.

In November, 1935, shortly before the registration provisions of the Public Utility Holding Company Act went into effect, certain organizational changes were made, designed to give petitioners the semblance of being independent entities. In the case of American, 17 employees of Bond & Share became, formally, officers and employees of American, and were removed, together with American's books and records, into a separate suite of rooms in the Bond & Share office building. Similarly, a group of 14 employees of Bond & Share became, formally, officers and employees of Electric and were moved, together with Electric's books and records, into a separate suite of offices adjoining those of American. The formal interlocking which had theretofore existed between the boards of directors of Bond & Share and petitioners and their subsidiaries was substantially terminated. At the same time Bond & Share organized Ebasco Services, Inc., a wholly-owned subsidiary, to which was transferred the entire service section of Bond & Share. The subsidiaries of petitioners duly entered into service contracts with Ebasco and have continued to operate under such arrangements up to the present time.

We think the Commission was justified in finding, as it did, that these changes were superficial, and in no way cured the vulnerability of petitioners under § 11(b)(2) of the Act. The personnel transferred to American and Electric were sufficient merely to perform the routine activities incident to the functioning of the subholding companies as corporate owners of securities. Petitioners were not endowed with the function of servicing their operating subsidiaries. The

[4] The Commission further pointed out that the charters contained express waivers of stockholders' preemptive rights and gave the directors power to authorize the issuance of additional stock and perpetual option warrants to such persons and at such prices as they deemed fit.

Commission added, "The record further establishes that there is close and constant contact and coordination between the personnel of the subholding company respondents and the personnel of Bond and Share and Ebasco and that, in [fol. 886] effect, the personnel of the subholding companies have functioned since November 21, 1935 as subsidary and complementary organizations of Bond and Share, possessed of substantially the same outlook, objectives, and loyalties as they had prior to November, 1935."

In its findings on the issue of undue complexity, the Commission was guided by the detailed statements of policy expressed by Congress in § 1 of the Act. 49 Stat. 803-804.

Petitioners have not in the past served any functional purpose in the management of their operating subsidiaries. The subsidiaries of American and Electric were grouped together for purposes of management on geographical lines "irrespective of holding company affiliation". The actual management prior to 1935 was performed by Bond & Share's own service section, and after 1935 by Ebasco, Bond & Share's wholly-owned subsidiary.

To petitioners' claim that they have served a useful purpose in assembling "scattered properties into compact and integrated companies" the Commission responded that the acquisition and combination of operating properties has really been done by Bond & Share, and that ownership has nominally been placed in the subholding companies "for the purpose of getting public investors to provide the money to: (1) reimburse Bond and Share, with a profit, for its entire investment in groups of assets, while leaving Bond and Share in undisturbed dominion of these assets and with claims to a portion of their earnings; and (2) acquire control of the greatest possible number of additional properties to which Bond and Share's dominion would extend."

Mr. S. R. Inch, then president of Bond & Share, testifying before the House Committee on Interstate and Foreign Commerce, while the Act was in process of passage, stated that the subholding companies "serve no functions except the very important ones of providing the equity money for, [fol. 887] and the cash needed from time to time by their own operating subsidiaries."

The Commission, however, pointed out that "no substantial amount of risk capital was furnished to the operating companies by either the subholding companies or by Bond and Share"; that the investments which the subholding

companies made in the securities of the operating companies "were made principally in the process of *purchasing control* of the operating companies from those in whom this control rested, a process which contributed nothing to the treasuries of the operating companies"; that it has been "the public investors in the securities of the subsidiaries of American and Electric who have supplied virtually all the capital that has gone into the development of such subsidiaries subsequent to their acquisition by American and Electric, just as it has been the public investors rather than Bond and Share who supplied to American and Electric the capital which enabled them to acquire such control." With respect to the claim that the subholding companies have conferred benefit upon their subsidiaries by supplying them with short-term capital in the form of loans, the Commission stated that "these loans do not impress us as having conferred any noteworthy benefit on the operating companies." Further, it found that since 1935 "American and Electric have made loans to subsidiaries in perhaps a dozen instances, the amounts involved being relatively small and in most cases for very short periods. Since the subholding companies charged from 3 to 6% on loans which almost certainly could have been obtained by the subsidiaries from banks for less, it is clear that the transactions were designed to benefit the subholding companies rather than the subsidiaries and were actually at the expense of the subsidiaries." Furthermore, it is not apparent why such loans could not just as readily have been made by Bond & Share itself.

[fol. 888] In commenting on the impression of simplicity and symmetry derived from a glance at the corporate chart of the Bond & Share system, the Commission pointed out that "each of the major corporate units at the base of the system itself has a complex capital structure in which the principles of pyramiding and leverage are employed in very full measure. Upon each such corporate structure there is superimposed a holding company with a complex structure of its own, and in turn, upon this holding company there is superimposed still another holding company having its own unduly complex structure, a high degree of pyramiding being employed in the process of superimposition." Although ostensibly the system is comprised of only three levels, nevertheless, the Commission stated, "income derived from the basic functions of the system, namely the

generation and sale of electric energy and gas, cannot reach the common stockholders of the top holding company until it has been filtered through *seven to fourteen* classes of securities having prior claims to such earnings." The complicating effect of this structure is described by the Commission as follows:

"This mutiplicity of steps obviously in itself creates a formidable problem for an investor in the securities of Bond and Share or the subholding companies seeking to appraise the earning power of his securities. The problem is, of course, greatly intensified by the fact that the system income does not progress in a straightforward continuous line from step to step until the top level is reached, but is drawn off and co-mingled at the level of the subholding companies with income from all the subsidiaries of each of the subholding companies, and there diverted to meeting the requirements of the security structures of the subholding companies. In the case of three of the five subholding companies (American, Electric and American & Foreign Power Company, Inc.), the corporate structures are so ill-balanced that for the last 10 years dividends on preferred stock have accumulated each year, and these accumulated arrearages [fol. 889] now constitute mountainous barriers athwart the flow of system income to the top level.

"Furthermore, the problem of income appraisal is acutely complicated when viewed from its dynamic rather than its static aspects, in appraising the effects of changes and shifts of income. Where the investor is required, as is here the case, to evaluate the future earnings prospects of securities resting near the top of a pyramided structure, he is confronted with the almost impossible task of measuring the magnified impact of income changes at the lower levels of the structure upon those higher in the pyramid resulting from the sharp leverage factor of hyper-attenuated equities.

"All the foregoing factors, of course, come into play as well in the appraisal of the asset value of the securities of Bond and Share and the subholding companies and serve to complicate the problems of appraisal beyond the limits of even the sophisticated investor."

We cannot say that the Commission was unwarranted in concluding that the corporate structure and continued exist-

ence of American and Electric unduly and unnecessarily complicate the holding company system of Bond and Share.

Nor can we say that the Commission was unwarranted in finding that the capital structure and continued existence of petitioners unfairly and inequitably distribute voting power among security holders of the Bond & Share system. The Commission, in reaching this conclusion, recited the facts in great detail, relying primarily (1) upon a historical survey of the steps and methods by which the Bond & Share system was put together and developed, with attention to the actual cost to Bond & Share and petitioners of investments whereby control of vast properties was secured, and (2) upon a consideration of the investments of Bond & Share and petitioners compared with the total capitalization of petitioners' subsidiaries, as appears on the companies' own books.

As of December 31, 1941, the total capitalization (including long-term debt and surplus) of American's subsidiaries [fol. 890] amounted to $729,143,155. Bond & Share controls this immense pool of capital through ownership of common and preferred stock of American representing, on the books, an interest of only 3.42% in the total capitalization of American's subsidiaries. As of December 31, 1941, the total capitalization (including long-term debt and surplus) of Electric's subsidiaries was $653,981,088. Bond & Share controls this immense pool of capital through ownership of common and preferred stock of Electric representing, on the books, an interest of only 8.72% in the total capitalization of Electric's subsidiaries. The Commission indicated that the disproportion would be much greater if adjustment were made for write-ups and insufficient depreciation reserves.

Petitioners contend that for purposes of this comparison the bonded indebtedness should be excluded from the capitalization totals, but the Commission was not obliged to disregard this element in determining whether holding company control "is exerted through disproportionately small investment", § 1(b)(3), a situation which Congress has found to be frequently productive of various evils.

At the hearing before the examiner American offered certain valuation testimony purporting to show the present valuation of assets and securities. The examiner excluded such evidence as irrelevant to the pending issues. In its final findings and opinion the Commission sustained this

ruling of the examiner on the ground that valuation testimony is inadmissible in an 11(b)(2) proceeding of this kind. Petitioners claim that this ruling by the Commission was error on the ground that the Commission's ultimate findings and orders were based in part upon findings by the Commission as to present valuation. We think we should indulge the presumption that the Commission and its lawyers would know enough not to commit the egregious blunder of (1) making a ruling that petitioners could not be allowed to [fol. 891] introduce valuation evidence, and (2) in the same document making ultimate findings predicated in part upon subsidiary findings as to valuation. This consideration would weigh with us in resolving any possible ambiguities that might exist in the Commission's findings. However, from a careful reading of the findings we do not believe that they rest upon subsidiary findings as to present valuations, or that valuation evidence, if introduced, would have made any difference in the Commission's findings and conclusions on the pending issues. A similar exclusion by the Commission of valuation evidence was sustained in *Commonwealth & Southern Corp.* v. *Securities and Exchange Commission*, 134 F. (2d) 747, 754 (C. C. A. 3d, 1943). Such valuation evidence may become relevant at a later stage, in proceedings under § 11(d) or § 11(e).

Accepting, as we have done, the Commission's ultimate statutory finding "that the corporate structures and continued existence of American and Electric unduly and unnecessarily complicate the structure of the Bond and Share system and unfairly and inequitably distribute voting power among the security holders of such system", we next have to consider the appropriateness of the remedy selected by the Commission. The companies must take such steps as the *Commission* shall find necessary to *ensure* that the requirements of § 11 (b) (2) are met as soon as practicable. It is not enough that some other remedy, suggested by petitioners, might accomplish the statutory purposes in whole or in part. The choice of remedy is a matter confided primarily to the expert judgment of the Commission, and in this field the courts are quite properly loath to set up their own judgment in opposition to that of the administrative tribunal. *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 194 (1941). In *Herzfeld v. Federal Trade Commission*, C. C. A. 2d, February 1, 1944, Learned Hand, C. J., pointed out that

[fol. 892] "the Supreme Court has as much circumscribed our powers to review the decisions of administrative tribunals in point of remedy, as they have always been circumscribed in the review of facts. Such tribunals possess competence in their special fields which forbid us to disturb that measure of relief which they think necessary. In striking that balance between the conflicting interests involved which the remedy measures, they are for all practical purposes supreme".

Here the Commission has found "that to effectuate the statutory requirements it is necessary that American and Electric be dissolved."[5] There can be no doubt that the remedy of dissolution will *ensure* that the corporate structures and continued existence of petitioners will no longer unduly complicate the structure of the Bond & Share system nor unfairly distribute voting power among the security holders of such system. We are unable to say that this choice of remedy is so lacking in rational basis as to amount to an arbitrary and capricious act outside the broad scope of discretion confided to the Commission.

The present litigation is but part of a larger proceeding instituted by the Commission to deal in accordance with the statutory mandates with the whole Electric Bond & Share system and all of its component parts. We are not in a position now to size up the whole broad situation, nor do we know what the Commission may have in mind to do with the many Bond & Share problems which will remain [fol. 893] after the present cases, dealing with two of Bond & Share's subholding companies, are disposed of.

Petitioners argue, somewhat plausibly, that if their corporate structures and continued existence have the found effects upon the Bond & Share system, the statutory requirements could have been met by simply removing them from such system without ordering their dissolution; and that this could be accomplished by an order directing Bond

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[5] Counsel for the Commission call our attention to the fact, for what it is worth, that in their answer filed in *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419 (1938), the present petitioners alleged that enforcement of § 11 would "leave them with no alternative but to dissolve, go out of business, and sacrifice their investments for anything that they may bring".

& Share, the top holding company, to divest itself of its control over the intermediate holding companies. But, as we have said, the Bond & Share system, with which the Commission is dealing in its entirety in the proceeding pending before it, embraces all of its component parts, including petitioners and their subsidiaries. The severance of the top holding company would minimize somewhat the complexities, but would leave untouched certain complexities, and perhaps some features of inequitable distribution of voting power, in the American and Electric components.

The Commission is not obliged, if there is a possible choice of remedy, to select the less drastic remedy which leaves the subholding companies in existence; indeed, § 1 (c) of the Act declares the policy to be "to provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided in this title". The fact that petitioners have themselves the technical status of registered holding companies does not guarantee their survival. Running through petitioners' briefs is the thought that the guilt, if any, is that of Bond & Share, and that it is unreasonable to destroy the innocent victims for the sins of the real culprit. But American and Electric have no independent standing as innocent victims. Since the time of their creation, as found by the Commission, they have been merely the creatures and instrumentalities of Bond & Share, utilized as pyramiding and leverage devices for the accomplish-[fol. 894] ment of purposes inimical to the policy of the Act.[6]

The Commission considered the suggestion that petitioners might be left in existence to perform the function of holding together integrated public utility systems as contemplated by § 11 (b) (1), and observed: "There is nothing about the subholding companies which makes them vehicles for holding together a single integrated system in any respect superior to any other corporate entity, and

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[6] Though the orders under review were directed to Bond & Share, as well as to American and Electric, Bond & Share filed no petition for review, being apparently confident that its interests would be fully represented by the present petitioners.

in fact it would seem that a company specially formed for this purpose, with appropriate domicile and a charter and by laws free from the complexities found in those of American and Electric, would be far preferable." As we understand the orders under review, it is open to each of the petitioners, in submitting plans for effectuation of the orders, to propose a reorganization along these lines looking toward the creation of a new holding company.

Petitioners raise a number of constitutional points, which are now in order to be considered.

It is contended that § 11 is beyond the power of Congress under the commerce clause. However, § 11 (b) (1) was held valid against such attack in *North American Co.* v. *Securities and Exchange Commission,* 133 F. (2d) 148, 153-54 (C. C. A. 2d, 1943), cert. granted, 318 U. S. 750 (1943). And § 11 (b) (2) was upheld against such attack in *Commonwealth & Southern Corp.* v. *Securities and Exchange Commission,* 134 F. (2d) 747, 752-53 (C. C. A. 3d, 1943), followed in *Central & South Western Utilities Co.* v. *Securities and Exchange Commission,* 136 F. (2d) 273 (App. D. C. 1943). To the same effect see *In re Commu-*
[fol. 895] *nity Power & Light Co.,* 33 F. Supp. 901 (S. D. N. Y., 1940). Petitioners have not sustained the rather heavy burden, which is theirs, of persuading us to create a conflict with these cases by holding otherwise. Resolving in favor of constitutionality any doubts that might exist, we think it sufficiently appears from the Act as a whole that § 11 is tied in with the commerce power.

True enough, § 11 (b) (2) contains no reference to interstate commerce. It applies to "each registered holding company, and each subsidiary company thereof". Petitioners argue that the Act is defective in that it contains no provision that the Commission must find "that the particular companies to which it applies Section 11 (b) (2) are actually engaged in, or do affect, interstate commerce, and that the changes in distribution of voting power and corporate structure directed by the S. E. C. affect interstate commerce".

Bond & Share and petitioners were obliged to register under § 5, because otherwise, as provided in § 4 (a), they could not have continued to use the instrumentalities of interstate commerce directly or through their subsidiaries in the operation of their business. *Electric Bond & Share Co.* v. *Securities and Exchange Commission,* 303 U. S. 419

(1938). As Judge Swan said in *North American Co.* v. *Securities and Exchange Commission, supra,* at page 153: "Section 3 provides administrative procedure by which a holding company can obtain exemption from any provision of the Act, if it and its subsidiaries are predominantly intrastate in character." The provision of the Act referred to is as follows:

"Sec. 3. (a) The Commission, by rules and regulations upon its own motion, or by order upon application, shall exempt any holding company, and every subsidiary company thereof as such, from any provision or provisions of this title, unless and except insofar as it finds the exemption detrimental to the public interest or the interest of investors or consumers, if—

[fol. 896] "(1) such holding company, and every subsidiary company thereof which is a public-utility company from which such holding company derives, directly or indirectly, any material part of its income, are predominantly intrastate in character and carry on their business substantially in a single State in which such holding company and every such subsidiary company thereof are organized; * * *"

In interpreting and applying its power of exemption under this section, the Commission has been guided by the provision in § 1 (c), reading:

"* * * it is hereby declared to be the policy of this title, in accordance with which policy all the provisions of this title shall be interpreted, to meet the problems and eliminate the evils as enumerated in this section, connected with public-utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce."

Thus it has ruled that an exemption otherwise allowable should not be denied under the "unless and except" clause of § 3 (a), unless the exemption would be detrimental to the interests of the public or of investors or consumers "by reason of any activities of the applicant or of any such subsidiary company in interstate commerce, or directly affecting or burdening interstate commerce." *Long Island Lighting Co.*, 1 S. E. C. 345, 346 (1936). This interpretation by the Commission is entitled to great weight and should

be accepted by the courts. *United States* v. *American Trucking Associations, Inc.*, 310 U. S. 534, 549 (1940); *Securities and Exchange Commission* v. *Associated Gas & Electric Co.*, 99 F. (2d) 795, 798 (C. C. A. 2d, 1938).

Furthermore, whatever might be the objection to applying § 11 (b) to a holding company whose activities are less clearly related to interstate commerce, there is no doubt that the present petitioners, and their parent company, "are engaged in activities which bring them within the ambit of congressional authority". *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419, 431 [fol. 897] (1938). Petitioners "are engaged in transactions of interstate commerce. That they conduct such transactions through the instrumentality of subsidiaries cannot avail to remove them from the reach of the federal power." 303 U. S. at 440. Petitioners occupy a "highly important relation to interstate commerce and the national economy". 303 U. S. at 441. Under § 32, if the application of § 11 to any person or circumstances should be held invalid, the application of such section "to persons or circumstances other than those as to which it is held invalid shall not be affected thereby."

It was not necessary for the Commission to find that the existing complexities of structure and inequitable distribution of voting power were adversely affecting interstate commerce in this particular case. Congress has found in § 1 that these evils often materially affect the interstate commerce in which the holding companies engage. There was ample basis for such finding in the reports of the Federal Trade Commission and of the committees of Congress which formed the basis of the legislation. *Cf. Ecker* v. *Western Pacific Railroad Corp.*, 318 U. S. 448, 474 (1943). The following statement in the opinion by Judge Maris in *Commonwealth & Southern Corp* v. *Securities and Exchange Commission*, 134 F. (2d) 747, 753 (1943), is pertinent at this point:

"Congress having thus incorporated its conclusion in the act itself it is not for this court to make an independent study of the economic data upon which the legislative conclusion was based. In view of its factual conclusion Congress was acting well within its constitutional power to strike at the evil by any means which seemed to it to be appropriate and desirable. It follows, likewise, that it is

not open for us to consider whether the complications of corporate structure which the Commission found to exist in Commonwealth's case do actually adversely affect interstate commerce. Since Congress has found that such complications have adversely affected interstate commerce in [fol. 898] many cases it is clearly within its power of policing that commerce to require the elimination of such complications in all cases."

The concluding proposition from the opinion just quoted is well supported by decisions in analogous situations. See *Stafford* v. *Wallace*, 258 U. S. 495, 520-21 (1922); *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, 40 (1923); *National Labor Relations Board* v. *Jones & Laughlin*, 301 U. S. 1, 43 (1937); *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 221-22 (1938).

Petitioners argue that whatever may be the extent of the power to regulate the practices of public utility holding companies, the orders of the Commission now under review are invalid on the ground that the federal government has no power, through any agency, to decree the dissolution of a state-created corporation. *Lillard* v. *Lonergan*, 72 F. (2d) 865, 870 (C. C. A. 10th, 1934), cert. denied, 293 U. S. 615 (1934). But the orders in question do not purport of their own force to dissolve the petitioners. In effect, the orders require petitioners to submit plans for complete liquidation, the realization of which will be accomplished pursuant to § 11(d) or § 11(e) of the Act; and when this is done, dissolution will follow under state law as a matter of course. The federal power here exercised by the Commission is similar to that exercised by the courts under the antitrust acts. In *Northern Securities Co.* v. *United States*, 193 U. S. 197 (1904), the court asserted its power to "make any order necessary to bring about the dissolution or suppression of an illegal combination that restrains interstate commerce" (p. 346). The decree in that case left the corporation no alternative but complete liquidation (pp. 355-56). In *Continental Insurance Co.* v. *United States*, 259 U. S. 156 (1922), the court proceeded even more directly to effectuate a dissolution. See pp. 163, 167. See also *United States* v. *American Tobacco Co.*, 221 U. S. 106, 187-88 (1911). Petitioners [fol. 899] would have felt no happier about the present orders, if instead of speaking in terms of dissolution the orders had directed petitioners to submit plans looking

toward the complete divestment by petitioners of their holdings in their subsidiary companies. In *Commonwealth & Southern Corp.* v. *Securities and Exchange Commission,* the court said (134 F. (2d) at pp. 752-53):

"It may be conceded, as Commonwealth urges, that the right to exist as a corporation, the power to own and vote stock in subsidiary companies, the right to issue stock having designated preferences, priorities, voting power and other rights, and the right to retire or redeem securities are all local matters, normally regulated by the laws of the state. It does not follow that Congress is restricted in the exercise of the commerce power because any or all of these rights are affected thereby. That is the fundamental weakness of Commonwealth's contention that if section 11(b)(2) is construed so as to permit an order which deals solely with the corporate structure of the holding company and the rights of the stockholders among themselves it is unconstitutional because outside the power conferred by the commerce clause. Such a contention takes entirely too narrow a view of the extent of the power conferred upon Congress by the commerce clause, for it is well settled that activities which are in themselves intrastate may be regulated by Congress if they affect interstate commerce."
See, also, Morawetz, The Power of Congress to Enact Incorporation Laws and to Regulate Corporations (1913) 26 Harv. L. Rev. 667, 680-81.

The contention is made that "compulsory involuntary reorganization can only take place through the exercise of the bankruptcy power", and that Congress cannot under the bankruptcy power compel the involuntary reorganization of solvent corporations. But the premise is not well founded, as the antitrust cases demonstrate. Section 11(b)(2) rests upon the commerce power, not the bankruptcy power.

Section 11(b)(2) as here applied does not amount to a taking of the private property of petitioners and their secur-[fol. 900] ity holders for public use without just compensation, in violation of the Fifth Amendment. Petitioners claim that the orders will result in taking their right to exist under their corporate franchises and the valuable property inhering in their organization and financing at great cost. Also, it is urged, the orders take from petitioners their right to retain their investments and from the stockholders their right to retain their indirect interest in such investments

through the subholding companies. Reliance is placed upon *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555 (1935), holding that Congress may not under the bankruptcy power take without compensation the substantive property rights of mortgagees for the benefit of farmer-mortgagors.

We do not think that the *Radford* case is controlling here. Not every curtailment or impairment of existing rights, nor every incidental business loss, resulting from regulatory legislation, is a "taking" in the constitutional sense. See *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 157-58 (1919); *Mugler* v. *Kansas*, 123 U. S. 623, 668-70 (1887); *Block* v. *Hirsh*, 256 U. S. 135, 155-57 (1921). In § 19 of the Banking Act of 1933, 48 Stat. 186-88, a holding company is forbidden to exercise its previously acquired property right to vote its shares of stock in a national bank unless a permit is first obtained from the Federal Reserve Board; and one of the conditions of obtaining such a permit is that the holding company must agree to divest itself within five years of any interest in any company engaged in the flotation or underwriting of securities. *Cf.* § 11 of the Panama Canal Act of August 24, 1912, 37 Stat. 566; *Lehigh Valley R. Co.* v. *United States*, 234 Fed. 682 (E. D. Pa., 1916), affirmed, 243 U. S. 412 (1917). *Cf.* also paragraph (11) of § 5 of the Interstate Commerce Act, as amended by the Emergency Transportation Act of 1933, 48 Stat. 219, and comment in H. Rep. No. 213 (73d Cong., 1st Sess.) p. 14. The court in the *Northern Securities* case, *supra*, apparently looking [fol. 901] through the corporate fiction and recognizing the stockholders of the holding company as the actual owners of the stock of the subsidiary companies, said (193 U. S. at 357-58): "The decree, if executed, will destroy, not the property interests of the original stockholders of the constituent companies, but the power of the holding corporation as the instrument of an illegal combination of which it was the master spirit, to do that which, if done, would restrain interstate and international commerce."

Petitioners' argument, if sound, would invalidate the whole of § 11(b). There could be no order under § 11(b)(1) for divestment of scattered holdings. Even the elimination of a third or fourth holding company tier could not be effectuated under the mandatory provisions of § 11(b)(2). It would indeed be a bit ironical if the decision of Brandeis, J., in the *Radford* case were held to debar Congress from requiring the reorganization and simplification of interstate

holding company systems so as to eliminate therefrom features likely to be productive of future consequences harmful to interstate commerce. We attribute no such effect to the *Radford* case. In *North American Co.* v. *Securities and Exchange Commission*, 133 F. (2d) 148, 154 (C. C. A. 2d, 1943), the court said:

"Compelling the holding company to dispose of its securities is not the same as condemning private property for public use without paying just compensation. Under section 11(c) the petitioner is given a year within which to comply with the order and may on proper showing obtain an additional period not exceeding one year. If divestment can be effected by distribution in kind, there may be no loss in values. If, as petitioner contends, such distribution will be impossible and a liquidation by sale becomes necessary, the process may be painful to its common stockholders, but we cannot say that the remedy selected by Congress is so unreasonable, arbitrary or capricious as to constitute taking property without due process."

In its broad aspect, § 11(b)(2) as here applied in the [fol. 902] exercise of the commerce power does not constitute a deprivation of property without due process of law. In view of the findings by Congress, and by the Commission in this case, the remedy selected cannot be said to be unreasonable or capricious. It bears "a real and substantial relation to the objects sought to be attained," namely, the protection of interstate commerce from various future harmful effects which may be anticipated as likely to flow from the undue complexities and inequitable distribution of voting power in the holding company systems. As the court recognized in *Nebbia* v. *New York*, 291 U. S. 502, 527 (1934), the Constitution "does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited; and the right to conduct a business, or to pursue a calling, may be conditioned."

There is the further argument that the proceedings before the Commission violated the due process clause because the security holders were not given notice of the proceedings and were not permitted to vote on the changes to be effected under § 11(b)(2). But the orders under review are directed only to the corporations, which are the named respondents, and we do not perceive that the stockholders are any more

indispensable parties here than they are in equity proceedings against corporations under the antitrust acts. Furthermore, the Commission here published in the Federal Register notice of a public hearing of the § 11(b)(2) proceedings, directed not only to the named corporate respondents but also "to all other persons, including the security holders and consumers of the said respondents" who were invited to file applications for intervention on or before a certain date. As to the absence of a vote by the security holders, certainly such a vote is inappropriate at the stage where the Commission is seeking to determine, under § 11(b)(2), whether it is necessary to discontinue the existence of the subholding companies in order to ensure that the [fol. 903] structure of the Bond & Share system shall not be unduly complicated and that the voting power shall not be inequitably distributed among the security holders of such system. In *Commonwealth & Southern Corp. v. Securities and Exchange Commission*, 134 F. (2d) 747, 753 (C. C. A. 3d, 1943), the court had this to say as to the rights of the stockholders in an 11(b)(2) proceeding:

"It is suggested by Commonwealth that the order is also in violation of the Fifth amendment with respect to its stockholders since it directs an alteration in their rights without their consent and without their having been heard. But without granting its validity we think that this point is premature. The order now under review, as we have pointed out, is primarily designed to enable Commonwealth to comply with the mandate of the law by obtaining the voluntary co-operation of its stockholders. If they do thus co-operate and adopt a plan which complies with the Commission's order obviously no question of want of due process can arise. On the other hand if a voluntary readjustment cannot be consummated and it becomes necessary to make application to a district court for the enforcement under sections 11(d) or 11(e) of a plan proposed by the Commission or the company the stockholders will have an opportunity to assert in the district court any objections, including want of due process, which they may have to the plan presented in so far as it affects their rights."

Section 11(b)(2) as here applied is not an "ex post facto law" in violation of the prohibition of Article I, § 9 of the Constitution. It is immaterial that the structures of the holding company systems may have been built up by means

which were lawful prior to the passage of the Public Utility Act of 1935. Section 11(b)(2) does not seek to punish anyone for past acts, lawful when done. It merely seeks, for the future, to eliminate factors in the structures of holding company systems likely to be productive of harm to interstate commerce. In *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 342 (1897), an anti-trust case, the court rejected a similar argument on the ex post facto point.

[fol. 904] Finally, petitioners argue at considerable length that § 11(b)(2) constitutes an unconstitutional delegation by Congress of legislative power to the Commission because it fails to set forth adequate standards for the Commission's guidance. Since the decisions in *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935), and *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935), counsel have hopefully advanced the delegation argument in many cases, without much success. See, for instance, *Mulford* v. *Smith*, 307 U.S. 38 (1939); *United States* v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533 (1939); *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381 (1940); *Opp Cotton Mills, Inc.* v. *Administrator*, 312 U.S. 126 (1941); *Federal Security Administrator* v. *Quaker Oats Co.*, 318 U.S. 218 (1943); *National Broadcasting Co., Inc.* v. *United States*, 319 U.S. 190 (1943); *Hirabayashi* v. *United States*, 320 U.S. 81 (1943). We think it clear that the standards in § 11(b)(2), though expressed in general terms, taken in conjunction with the declaration of policy contained in § 1 and the description of the abuses which Congress sought to eliminate, satisfy the constitutional requirements, and afford an adequate guide to the administrative agency. It was so held in *Commonwealth & Southern Corp.* v. *Securities and Exchange Commission*, 134 F. (2d) 747, 752 (C.C.A. 3d, 1943). It may be said here, as the court said in *Sunshine Anthracite Coal Co.* v. *Adkins, supra*, at page 398, that "in the hands of experts the criteria which Congress has supplied are wholly adequate for carrying out the general policy and purpose of the Act. To require more would be to insist on a degree of exactitude which not only lacks legal necessity but which does not comport with the requirements of the administrative process."

Decree will be entered affirming the orders of the Commission.

[fol. 905] In United States Circuit Court of Appeals

No. 3823

American Power & Light Company, Petitioner,

v.

Securities and Exchange Commission, Respondent

Decree—March 17, 1944

This cause came on to be heard June 1, 1944, upon petition for review of orders of the Securities and Exchange Commission, and was argued by counsel.

Upon consideration whereof, It is now, to wit, March 17, 1944, here ordered, adjudged and decreed as follows: The order of the Securities and Exchange Commission of August 22, 1942, requiring dissolution of American Power & Light Company, and the order of August 28, 1942, denying the petition to vacate said order of August 22, 1942, are hereby affirmed.

By the Court,

/s/ Arthur I. Charron, Clerk.

In United States Circuit Court of Appeals

No. 3824

Electric Power & Light Corporation, Petitioner,

v.

Securities and Exchange Commission, Respondent

Decree—March 17, 1944

This cause came on to be heard June 1, 1944, upon petition for review of orders of the Securities and Exchange Commission, and was argued by counsel.

[fol. 906] Upon consideration whereof, It is now, to wit, March 17, 1944, here ordered, adjudged and decreed as follows: The order of the Securities and Exchange Commission of August 22, 1942, requiring dissolution of Electric Power & Light Corporation, and the order of August 28,

1942, denying the petition to vacate said order of August 22, 1942, are hereby affirmed.

By the Court,

/s/ Arthur I. Charron, Clerk.

Thereafter, to wit, on March 31, 1944, in each case, a petition for rehearing was filed by petitioner, which was denied by order of Court on April 18, 1944.

[fol. 907] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 908] Supreme Court of the United States, October Term, 1945

No. 6

Order Allowing Certiorari—Filed May 28, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted, and the case is assigned for argument on Monday, October 8th, next.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

[fol. 909] Supreme Court of the United States, October Term, 1945

No. 7

Order Allowing Certiorari—Filed May 28, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted, and the case is assigned for argument on Monday, October 8th, next.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

JUN 16 1944

Supreme Court of the United States

OCTOBER TERM, 1944.

No. [redacted] 4

AMERICAN POWER & LIGHT COMPANY,
Petitioner,

against

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT OF PETITION.

ARTHUR A. BALLANTINE,
31 Nassau Street,
New York 5, N. Y.;

JOHN F. MACLANE,
120 Broadway,
New York 5, N. Y.;

FRANK A. REID,
Two Rector Street,
New York 6, N. Y.;
Counsel for Petitioner.

June 16, 1944.

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Supreme Court of the United States

OCTOBER TERM, 1944.

No. .

AMERICAN POWER & LIGHT COMPANY,
Petitioner,

against

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

American Power & Light Company prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the First Circuit to review the decree of that Court entered in the above-entitled cause on March 17, 1944, affirming an order of the Securities and Exchange Commission (hereinafter referred to as the S. E. C.), dated August 22, 1942, directing that the petitioner be dissolved.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 24(a) of the Public Utility Holding Company Act of 1935 (49 Stat. 803, 834-5; 15 U. S. C. §79x(a)) and Section 240(a) of the Judicial Code, as amended (28 U. S. C. §347(a)).

The Opinions Below.

The opinion of the Circuit Court of Appeals for the First Circuit (R. 868) was rendered on March 17, 1944 and is reported in 141 F. (2d) 606. On April 18, 1944 that Court handed down an order denying the petitioner's application for rehearing (R. 901).

The opinion of the S. E. C. rendered August 22, 1942 has not yet been officially reported. It is contained in the printed record (R. 523), and the S. E. C. has distributed it as its Holding Company Act Release No. 3750. On August 28, 1942, the S. E. C. denied the petitioner's application for rehearing (R. 677).

Statute Involved.

The statute involved is the Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 U. S. C. §79, hereinafter referred to as the "Act"). The S. E. C.'s order was made under Section 11(b)(2) of the Act (49 Stat. 820-1; 15 U. S. C. §79k(b)(2)). The portion of Section 11(b)(2) directly involved reads as follows:

> "(b) It shall be the duty of the Commission [the S. E. C.], as soon as practicable after January 1, 1938:
>
> • • • • • • •

"(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system."

Summary Statement.

The petitioner is a solvent corporation, organized under the laws of the State of Maine, which registered under the Act in 1938 (R. 537, 568, 659, 671). The petitioner is part of the Electric Bond and Share Company holding company system as defined in the Act, since Bond and Share owns more than 10% of the voting shares, namely, 2.9 per cent. of the preferred stock and 31.15 per cent. of the common stock of the petitioner, together constituting 20.7 per cent. of the voting power (R. 537-8).

The petitioner owns practically all the common stocks and some other securities of 15 corporations which are operating electric (and, in a few instances, gas) public utilities (R. 539, 659). Thus the petitioner and its subsidiaries themselves constitute a separate holding company system under the Act.

The petitioner's debentures are outstanding in the hands of over 10,000 public holders and there are over 34,000 public holders of the petitioner's preferred and common stocks. As the record shows, Bond and Share does not have anything like majority voting power in the petitioner. Bond and Share's control has stemmed from the fact that

the public security holders have voluntarily chosen to vote with Bond and Share (R. 616-7).

In May 1940, the S. E. C. instituted a proceeding under Section 11(b)(2) against Bond and Share, the petitioner and others (R. 27). By order dated June 7, 1940, the S. E. C. limited the proceeding (so far as it concerned the petitioner) to the issue whether under Section 11(b)(2) it was necessary to "discontinue the existence" of the petitioner "in order to ensure that the structure of the holding company system of Electric Bond and Share Company shall not be unduly or unnecessarily complicated and that voting power shall not be unfairly or inequitably distributed among the security holders in that system." (R. 64). Hearings were held and thereafter, on August 22, 1942, the S. E. C. rendered its findings and opinion and entered the order in which it directed that the petitioner be dissolved, and that the petitioner and Bond and Share submit a plan or plans to the S. E. C. for the effectuation of the order (R. 523, 650).

The petitioner contends that Section 11(b)(2) of the Act under which the S. E. C. proceeded is unconstitutional, that the S. E. C. dissolution order deprives it of its property without due process of law, and that additional grounds hereinafter set forth also require that the S. E. C. order be set aside.

The Questions Presented.

I. Is Section 11(b)(2) of the Act unconstitutional:

(a) as not being within the power granted by the Constitution of the United States to the Congress to regulate commerce among the several States or any other power granted in the Constitution to the Congress?

(b) in that it authorizes depriving the petitioner of its property without due process of law and the taking of the petitioner's property for public use without just compensation in violation of the Fifth Amendment to the Constitution?

(c) in that it improperly delegates legislative functions to the S. E. C.?

(d) in that it is an *ex post facto* law prohibited by the Constitution?

(e) if it authorizes the S. E. C. to dissolve petitioner, a corporation of the State of Maine?

II. Is the S. E. C. order unconstitutional as depriving petitioner of its property without due process of law:

(a) in that the dissolution of this petitioner is an unreasonable, arbitrary and oppressive means of carrying out Section 11(b)(2) of the Act?

(b) in that the S. E. C. refused to take and consider evidence offered by the petitioner on the issues to be decided by the S. E. C., and the petitioner was thus denied a hearing?

(c) in that there is no basis in the record for the S. E. C. order, and in that the S. E. C. erred as a matter of law in its conclusion that there was an unfair and inequitable distribution of voting power and an undue and unnecessary complication of structure which would support the order?

(d) in that the purported findings relied on by the S. E. C. to support its order are fundamentally defective on their face?

III. Did the S. E. C., and the Circuit Court of Appeals in approving its action, err in refusing to accord the petitioner a hearing on its plan under Section 11(e) of the

Act for reorganization of its system so as to conform to the Act?

IV. Did the Circuit Court of Appeals err in refusing to consider the important issues of law listed in "V" below on the ground that they were not argued before the S. E. C.?

V. Should the orders of the S. E. C. dated August 22, 1942 and August 28, 1942 be set aside and the order of affirmance by the Circuit Court of Appeals be reversed on each of the following grounds which that Court would not consider:

(a) that Section 11(b)(2) of the Act does not authorize the S. E. C. to direct dissolution of any corporation?

(b) that the S. E. C. order is unenforceable and void because neither this petitioner nor Bond and Share nor the S. E. C. nor the Federal Court has any means of carrying out the dissolution of the petitioner?

(c) that the S. E. C. has not found and specified in its order, as expressly required by Section 11(b)(2), the steps which the petitioner must take and thereby seeks to deprive the petitioner of the period granted by Section 11(c) of the Act within which to comply with a definitive order under Section 11(b)(2)?

Specification of Errors to be Urged.

The Circuit Court of Appeals, in affirming the order of the Commission, erred on each and all of the grounds hereinbefore referred to.

Reasons Relied on for the Allowance of the Writ.

This Court has not yet passed on the constitutionality of Section 11(b)(2) of the Act or on the constitutionality

of any order of dissolution entered under the Act. Accordingly, in upholding the constitutionality of Section 11(b)(2) and of the dissolution order (Questions I and II above), the Circuit Court of Appeals for the First Circuit has decided important questions of Federal law which have not been, but should be, settled by this Court. We further submit that, in deciding these important Federal questions, the Court below has not followed applicable decisions of this Court arising under other statutes, and that as to certain important Federal questions (II(a), III, IV and V above), the Court below has denied to petitioner the right to the Court review which is granted it by the Act and, in doing so, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

In *Landis* v. *North American Co.*, 299 U. S. 248 (1936), the Court referred to the importance and significance of the novel questions arising under the Act, saying (p. 256):

> "In these Holding Company Act cases great issues are involved, great in their complexity, great in their significance. * * * On the law there will be novel problems of far-reaching importance to the parties and the public."

This Court has also heretofore recognized that the constitutional questions presented by Section 11(b)(1) of the Act are of outstanding importance and should be passed upon by this Court. Thus, this Court has granted writs of certiorari in *North American Company* v. *Securities & Exchange Commission*, 318 U. S. 750, March 1, 1943, and in *Engineers Public Service Company* v. *Securities and Exchange Commission* (June 5, 1944), which involve the constitutionality of Section 11(b)(1) of the Act. If a writ is granted here opportunity is afforded for a final adjudica-

tion of the constitutionality of both Sections 11(b)(1) and 11(b)(2), which has been and still is involved in so many cases before the Securities and Exchange Commission and the Courts.

In addition to the broad questions underlying both Sections 11(b)(1) and 11(b)(2), the latter sub-section presents further questions not involved in the former. Section 11(b)(2) is vague and general, both with regard to the matters falling under its operation and with regard to the remedy to be applied thereunder, and it has here resulted in an order for the dissolution of a state corporation which is not even claimed to have violated any Federal or state law. Before passage of the Act, so far as we can find, no order of dissolution of a state corporation had ever been entered by any Federal Court where the corporation had not been found guilty of violation of a Federal law,—and even in the cases where a state corporation had been found guilty of violation of a Federal law the order has provided for corporate dissolution only where there was consent to that feature of the order.

WHEREFORE, it is respectfully submitted that because of the importance of the Federal questions presented and the other reasons set forth above, this petition for a writ of certiorari to review the decision of the Circuit Court of Appeals for the First Circuit should be granted.

AMERICAN POWER & LIGHT COMPANY,
Petitioner.

By: ARTHUR A. BALLANTINE,
JOHN F. MACLANE,
FRANK A. REID,
Counsel for Petitioner.

June 16, 1944.

BRIEF IN SUPPORT OF PETITION.

This brief contains a summary discussion of each of the questions of law presented in the petition.

I (a). **Section 11(b)(2) is not within any Congressional power.** The question of the power of Congress to enact Section 11(b) of the Act was the subject of wide discussion even before the Act was passed. It was sought to bring this constitutional question before this Court in 1938 (*Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419 (1938)), but the Court held that the constitutional questions raised by Section 11(b) were not before it for decision in that case and that it would consider only the validity of the registration provisions of the Act (Sections 4 and 5).

The present case is the first one coming before this Court in which the S. E. C. has actually pronounced a "death sentence", that is, has ordered a corporation to be dissolved and its existence terminated, so that the questions held by this Court not to be presented in the *Electric Bond and Share* case are here presented for determination, and should be settled by this Court.

The only constitutional basis urged as support for Section 11(b)(2) is the Federal power over interstate commerce. But the sub-section cannot be sustained as an exercise of that power.

No mention of interstate commerce appears in Section 11(b)(2). The registration provisions of the Act (Sections 4 and 5) mention interstate commerce but these provisions are so broad that corporations are brought under Section 11(b)(2) irrespective of their being engaged in commerce or affecting commerce. The findings contained in Section 1 of the Act also mention interstate commerce, but they amount to no more than general statements that

public utility holding companies and their subsidiaries "often" engage in interstate commerce and that an investigation has disclosed various evils in the public utility field. These findings cannot properly be found to be a basis for the almost unlimited scope of Section 11(b)(2).

If the decision below holding Section 11(b)(2) to be within the power of Congress were correct, then it would seem that Congress could validly enact a statute reciting that because "many" corporations are engaged in interstate commerce and some evils have arisen in connection with corporate business, a commission is to be appointed to take jurisdiction over *all* corporations to alter the distribution of voting power in, or the corporate structure of, any of them or terminate their existence. It has not heretofore been thought that legislation as sweeping as that could be rested by Congress on any of the powers granted it in the Constitution.

The sub-section is certainly not based on the bankruptcy power. It is not limited in its application to corporations which are insolvent in either the equity or bankruptcy sense.

Since Section 11(b)(2) is not confined in its operation to interstate commerce but matters not included within the commerce power are "so interblended in the statute that they are incapable of separation", the decision of the Court below, holding Section 11(b)(2) to be within that power of Congress, is in conflict with applicable decisions of this Court. (*Hill* v. *Wallace*, 259 U. S. 44, 68 (1922); *The Employers' Liability Cases*, 207 U. S. 463, 504 (1908)).

I (b). **Section 11(b)(2), if interpreted as authorizing the order of the S. E. C. herein, violates the Fifth Amendment to the Constitution by taking petitioner's property for public use without just compensation and depriving petitioner of its property without due process of law.** Dissolu-

tion of the petitioner under Section 11(b)(2) takes its property by destroying its corporate franchises granted to it by the State of Maine, takes its right to exist under such franchises, takes by destruction the value of property rights inhering in the great costs heretofore incurred in organizing and financing petitioner and takes from the petitioner its right to retain its investments in the stocks and other securities of its subsidiaries. Dissolution also takes from the petitioner's 44,000 security holders their right to retain their direct investments in the petitioner and their indirect interests, through the petitioner, in the petitioner's subsidiaries. These property rights are of great value. They are taken under Section 11(b)(2) for the sole purpose of creating theoretically ideal structures in the public utility field which is deemed to benefit the public generally. We submit that the decision of the Court below upholding the taking of such private property for such a public purpose without a condemnation proceeding and payment of just compensation is in direct conflict with the decisions of this Court in *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555 (1935) and in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393 (1922).

If the decision of the Court below is to stand, then it constitutes a holding that the Federal Government, in exercising its commerce power, or any state government, may decree for any reason which it views to be in the public interest that an existing corporation, which was not set up in violation of any law (whether it be an agricultural corporation or a railroad corporation or a church or a university) shall be dissolved, or that such a corporation, or any individual, has too much property and must sell most of it within, say, two years to those who may wish to buy the property. It is for this Court to settle the question whether

such a taking of property is barred by the Fifth and Fourteenth Amendments in the absence of a condemnation proceeding and payment of just compensation.

Section 11(b)(2) also violates the due process clause because, in subjecting a corporation to involuntary reorganization, it does not contain the minimum safeguards required even for a reorganization forced by an exercise of the bankruptcy power. Here again, it had never been held by this Court, or so far as we know, before passage of the Act, by any Court, that where a corporation had not been guilty of violation of any law, it could be reorganized by a simple fiat of a Federal commission without even a vote of the security holders.

The Court below held that, if the taking of property under Section 11(b)(2) is not "capricious," it did not constitute a taking of property requiring payment of just compensation (R. 897). We submit that this is not and cannot be the test of whether property may be taken without compensation. It has never been the law that property condemned for a public improvement may be taken without compensation merely because the improvement is planned and deliberate and, therefore, not capricious.

I (c). **Section 11(b)(2) improperly delegates legislative functions to the S. E. C.** Section 11(b)(2) nowhere sets forth any standard or principle to guide the S. E. C. in issuing orders thereunder. The sub-section provides that it is called into action when there is an undue or unnecessary complication of structure or an unfair or inequitable distribution of voting power in a holding company system. We submit that this does not constitute anything like a reasonably definite standard.

With terms as vague as these (having no common law meaning and never used in any statute before passage of

the Act) the S. E. C. is given unlimited power to create its own definitions of what is, and what is not, allowable in a holding company structure. The S. E. C. is free to come to different conclusions on similar states of facts appearing in different cases or to change at whim, from case to case, the application it makes of these phrases because there is no standard to which it can be held (*Cf.*, for example, the order in *The United Corporation*, S. E. C. Holding Company Act Release No. 4478, August 16, 1943). Furthermore, the action to be taken by the S. E. C. when it finds these conditions to exist is not specified in Section 11(b)(2) which purports to authorize the S. E. C. then to "take such steps as the Commission shall find necessary".

We find no decision of this Court relating to other statutes which upholds so vague a delegation of legislative power.

We submit that, in holding valid the delegation of legislative power contained in Section 11(b)(2), the decision of the Court below is in conflict with *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935), and *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495 (1935).

I (d). **Section 11(b)(2), as construed by the S. E. C. in the present case, is an *ex post facto* law prohibited by the Constitution.** The findings and opinion of the S. E. C. are largely devoted to a criticism of acts committed in the past in building up the structure of the Bond and Share holding company system. The opinion charges Bond and Share with having derived undue profits through its control of the petitioner and other corporations. However, there is no claim that any act of Bond and Share was in conflict with any Federal or state law. If these past acts of Bond and Share determine whether there is now an unfair or inequitable distribution of voting power and

undue or unnecessary complication of structure and also can be used, not merely as a basis for an order against Bond and Share, but as the basis of an order against this petitioner, then Section 11(b)(2) is an *ex post facto* law of the worst possible type.

The Court below held that it was immaterial under Section 11(b)(2) how the present structures were built up (thus in effect holding that the greater part of the findings and opinion of the S. E. C. were irrelevant) and therefore, that Section 11(b)(2) was not an *ex post facto* law (R. 898-9). But the Court also held that the Commission's conclusions were not based on present valuations and therefore that the petitioner's valuation evidence was properly excluded by the S. E. C. (R. 888). This, it seems to us, leaves nothing on which the Commission's conclusions may rest, since both the past facts and the central present fact are held irrelevant. It would seem to be obvious that the S. E. C. order has no basis at all unless it rests on past facts or present facts, and that the Court below erred in holding that it was valid even if it rests on neither.

We submit that, to the extent that the order is sought to be rested on the past facts which make up a large portion of the S. E. C. opinion and the dissolution of petitioner is grounded on the alleged past sins of Bond and Share, the order is based on a construction of Section 11(b)(2) which makes it unconstitutional as an *ex post facto* law imposing punishment for acts legal when done.

Fletcher v. *Peck*, 6 Cranch, 87 (1810);
Cummings v. *State of Missouri*, 4 Wall. 277 (1866);
Ex Parte Garland, 4 Wall. 333 (1866);
Pierce v. *Carskadon*, 16 Wall. 234 (1872).

I (e). **Congress has not the power to authorize the S. E. C. to dissolve a Maine corporation.** Until the decision was rendered below, no Court seems to have held that the Federal Government had the power to order dissolution of a state corporation. The authorities were uniformly to the effect that there was no such power,

Chicago Title and Trust Co. v. *Forty-One Thirty-Six Wilcox Bldg. Corp.*, 302 U. S. 120, 127 (1937);

Society for the Propagation of the Gospel v. *Town of New Haven*, 8 Wheat. 464, 483 (1823);

Lillard v. *Lonergan*, 72 F. (2d) 865, 870 (C. C. A. 10th, 1934), cert. den. 293 U. S. 615;

Maguire v. *Mortgage Co. of America*, 203 Fed. 858, 859 (C. C. A. 2nd, 1913);

Syrian Antiochean St. George's Orthodox Church v. *Ghize*, 258 Mass. 74 (1927), 154 N. E. 839, 842;

Commonwealth v. *First National Bank and Trust Co.*, 303 Pa. 241 (1931), 154 A. 379, 380;

Sun River Stock & Land Co. v. *Montana Trust & Savings Bank*, 81 Mont. 222, 262 P. 1039 (1928).

Even in the situations where it was found that state corporations had violated a Federal law, such as the Sherman Act, no case has been found where the Federal Courts have decreed dissolution in a contested proceeding. Under the Sherman Act, the Federal Courts have terminated *combinations* in restraint of trade, effected *after* the passage of that statute *and in violation of* that statute through the medium of state corporations, but they have not purported to decree destruction or dissolution of the state corporation. For example, the most drastic action taken by the

Federal Government under the anti-trust laws is represented by the decisions in:

Northern Securities Co. v. *U. S.*, 193 U. S. 197 (1904);

U. S. v. *Reading Co.*, 253 U. S. 26 (1920) (and *Continental Co.* v. *U. S.*, 259 U. S. 156 (1922), further proceedings in same case.)

In the *Northern Securities Co.* case, *supra*, this Court, referring to the lack of Federal power to dissolve state corporations, said (at p. 346):

> "The Federal court may not have power to forfeit the charter of the Securities Company; it may not declare how its shares of stock may be transferred on its books, nor prohibit it from acquiring real estate, nor diminish or increase its capital stock. All these and like matters are to be regulated by the State which created the company."

The Court below tacitly conceded the validity of petitioner's contention that the Federal Government has not the power to dissolve a state corporation, but held that the order, while directing dissolution and termination of existence, could be considered as something else, namely, an order for complete liquidation, that complete liquidation is the practical equivalent of dissolution and that an order for complete liquidation of a state corporation is within the power of the Federal Government (R. 894). For the authority to order complete liquidation the Court below referred only to cases involving violation of the anti-trust laws, while the petitioner here is not claimed to have violated any law. But leaving that aside, we submit that the S. E. C. order must be tested by what it directs, rather than by what it might have directed, and that since it

directs dissolution of a state corporation, which is clearly beyond the power of the Federal Government as shown by the authorities cited above, including decisions of this Court, the dissolution order should have been set aside.

II (a). **The S. E. C. order for the dissolution of this petitioner is an unreasonable, arbitrary and oppressive means of carrying out Section 11(b)(2), and therefore deprives petitioner of its property without due process of law.** As has already been set forth, Bond and Share owns securities of the petitioner giving it 20.7% of the voting power. The remaining 79.3% of the voting power is in the hands of 34,000 public stockholders of the petitioner. On the S. E. C.'s calculations, Bond and Share owns less than 4½% in book value of the petitioner's stock (R. 537-8). The S. E. C. has found that control of the petitioner through this small interest causes an unfair and inequitable distribution of voting power and an undue and unnecessary complication of structure in the Bond and Share holding company system, consisting, under the Act, of Bond and Share as the top holding company, the petitioner as the intermediate holding company, and the petitioner's operating subsidiaries. The S. E. C. proceeding was expressly limited to the petitioner's effect on the Bond and Share system and no issue was raised as to the petitioner's own system (R. 64).

Petitioner contended below that the remedy for the statutory wrong found to exist should be to order Bond and Share to divest itself of the securities it owned in the petitioner and thus eliminate the petitioner from its system. Instead, the S. E. C. ordered the dissolution of the petitioner.

The Court below referred to the petitioner's contention as "somewhat plausible" (R. 889), but said that Courts are

loathe to set up their own judgment in opposition to that of the administrative tribunal and that dissolution of the petitioner would "ensure" that it no longer had an adverse effect on the Bond and Share system (R. 888-9). The Court below refused to weigh any method of carrying out Section 11(b)(2), as against the S. E. C.'s method of dissolving the petitioner, on the ground that the method used by the S. E. C. did "ensure" the carrying out of that provision. Also, the Court below improperly went outside the record and outside the issue in this proceeding for support for this ruling. It referred (R. 889) to possible problems not known to the Court but which might be before the S. E. C. in other proceedings involving Bond and Share, a consideration wholly foreign to the present proceeding; and it said (R. 890) that severance of Bond and Share from petitioner would leave untouched whatever defects there were in the petitioner's own system, notwithstanding that this proceeding had been expressly limited by the S. E. C. to consideration of alleged defects in the Bond and Share system.

This ruling by the Court below was in effect an abrogation of the judicial function by denial of the right of Court review expressly granted by Section 24(a) of the Act, and a denial of due process. Reduced to its simplest terms, the Court below has announced the principle that a remedy need not be commensurate with or proportional to the wrong but that capital punishment, being a universal solvent, cures all ills and may be applied in every case.

II (b). **Petitioner was denied the hearing to which it was entitled under the due process clause of the Fifth Amendment by reason of the S. E. C.'s refusal to take and consider its valuation evidence.** The S. E. C. staff at the hearings before the Examiner introduced in evidence com-

putations designed to raise the question as to whether the equity of the petitioner in its subsidiaries as appearing from the books of account was too high because of inflated asset values and inadequate depreciation reserves. In its findings and opinion, the S. E. C. expressly refrained from finding that these computations were correct, but it nevertheless proceeded to deduct the amounts thereof from the petitioner's book equity, thereby reducing the 69% book equity to 4.75%, and then held that control by the petitioner of its subsidiaries with so small an interest therein was forbidden by Section 11(b)(2) (R. 619-22).

To meet these unsupported computations which the S. E. C. used in its findings and opinion, the petitioner at the hearings before the Examiner offered evidence designed to show the true values of the properties (*e. g.*, R. 239-41, 254-5). This valuation evidence was based on data as to earning power, physical values and the amount of adequate depreciation. The Examiner excluded this evidence (R. 246-7) and both the S. E. C. (R. 532) and the Court below (R. 887-8) have sustained the exclusion of the evidence on the ground that there was no issue of present value in the proceeding.

It would seem clear, as already stated, that Section 11(b)(2) and the S. E. C. order of dissolution must be based either on events occurring in the past or on present facts, and that if the S. E. C. order represents punishment of the petitioner for alleged sins of Bond and Share in the past, Section 11(b)(2), so construed, is an *ex post facto* law (Point I(d) above). Here we point out that if Section 11(b)(2) is called into operation by present facts, then the central present fact determining whether there is an unfair or inequitable distribution of voting power and an undue and unnecessary complication of structure is the valuation of the respective interests of security holders in petitioner

and its subsidiaries. The S. E. C. findings and opinion indicate this by measurement of the respective interests in percentages arrived at by deduction of huge hypothetical amounts of alleged asset inflation and huge hypothetical amounts of alleged under-depreciation in the accounts of these subsidiaries (R. 619-20, 665). Yet, when petitioner sought to meet these unsupported hypotheses by actual evidence of value, that evidence was excluded on the ground that there was no issue of valuation. This was clearly error, because if Section 11(b)(2) is valid the conclusions thereunder in this case must have been based on present relative values of the various interests, and the S. E. C. in its findings and opinion did in fact purport to measure the relative interests in coming to its conclusions.

The Court below, in sustaining the S. E. C. order notwithstanding exclusion of petitioner's valuation evidence, said that it "should indulge the presumption that the Commission and its lawyers would know enough not to commit the egregious blunder" of excluding the valuation evidence while still deciding the case on a valuation issue (R. 888). By indulging this presumption, contrary to facts of record, the Court in effect denied the petitioner a review of the Commission's action. The valuation evidence was in fact excluded and the decision of the Commission was based on a valuation issue, *i. e.* the present size of the relative interests in the corporation involved.

We submit that the Court below, in sustaining the exclusion of the petitioner's valuation evidence by the S. E. C., has decided a Federal question in a way in conflict with the following decisions of this Court which have held refusal of a hearing on evidence which is relevant and material to be a violation of the due process clause of the Fifth Amendment or of the Fourteenth Amendment:

Chicago Junction Case, 264 U. S. 258 (1924);

St. Joseph Stock Yards Co. v. *United States,* 298 U. S. 38 (1936);
Ohio Bell Telephone Co. v. *Public Utilities Commission of Ohio,* 301 U. S. 292 (1937);
Morgan v. *United States,* 304 U. S. 1 (1938);
National Labor Relations Board v. *Indiana & Michigan Electric Co.,* 318 U. S. 9 (1943).

II (c). The S. E. C. dissolution order deprives petitioner of its property without due process of law because, as a matter of law, there was no basis in the record for the S. E. C.'s conclusion that there was an unfair and inequitable distribution of voting power and an undue and unnecessary complication of structure.

1. As to alleged unfair or inequitable distribution of voting power.

The S. E. C. opinion does not say who is now being unfairly or inequitably deprived of voting power. It announces merely the general conclusion that unfair or inequitable distribution of voting power does exist. In these circumstances, the only way to ascertain who is supposed to have too much voting power and who too little, is to consider to whom voting power is redistributed by the order of dissolution.

The order affects only the voting power of petitioner's stockholders. The petitioner's stockholders consist of Bond and Share and the public stockholders, Bond and Share having 20.7% of the voting power and the public stockholders 79.3% (R. 617). The S. E. C. has never claimed that the public stockholders of the petitioner have unfairly large voting power and it is clear that they do not have. But is is equally clear that Bond and Share's holdings of petitioner's stocks do not give it voting control but such

control stems from the fact that the public stockholders, as shown by the record, have for many years voluntarily voted their stock with Bond and Share (R. 617).

There simply was no basis in the record for finding that anyone was unfairly deprived of voting power, and, this being so, the S. E. C. order should have been set aside by the Court below. Instead, that Court merely said that, in making its order, the S. E. C. relied upon a historical survey of how the Bond and Share system was put together, and upon a consideration of the investments of Bond and Share and the petitioner compared with the total book capitalization of petitioner's subsidiaries (R. 887). Not only do these not support the findings, but, being conclusions on historical facts leading up to the present state of facts rather than on the present state of facts themselves, their adoption as the basis for decision makes the order an unconstitutional *ex post facto* penalty for past acts which were legal when done.

2. As to alleged undue and unnecessary complication of structure.

Section 11(b)(2) does not contemplate that three-layer holding company systems *per se* constitute an undue or unnecessary complication. The "great-grandfather" clause of the sub-section forbids only four-layer systems.

There is nothing unusually complicated in the Bond and Share holding company system with the top holding company having outstanding preferred and common stock, the petitioner, as the intermediate holding company, having outstanding debentures, preferred stock and common stock, and the operating subsidiaries in turn having outstanding bonds, preferred stock and common stock. Contrasted with such a holding company system, the corporate structure of many railroad and industrial systems would be infinitely

more complicated. The extreme illustrations of greater complexity cited by the S. E. C. are occasional, unimportant, and without substance in relation to the issues in the proceeding.

The S. E. C. findings and opinion (R. 634) and the opinion of the Court below (R. 884) state that the petitioner is "unnecessary" because it does not actually supervise the detailed operation of its subsidiaries. Of course the petitioner is not "necessary" for the purpose of doing a great many things which it was not organized to do and never intended to do. Such supervision is not an inherent holding company function.

Neither the S. E. C. nor the Court below paid any attention to the fact that the petitioner performs the functions which it was organized to perform, that those functions are important to the investors in the petitioner, and that the petitioner therefore can in no sense be considered "unnecessary". The petitioner has performed the economic functions for its investors of diversifying for them their investments in the public utility field in fifteen public utility operating companies, of acting as a medium through which the investors can concentrate and make effective their votes on the common stocks of the operating subsidiaries, of servicing their investment both indirectly in these subsidiaries and directly in petitioner, and of realizing large annual income tax savings (in excess of the entire expense of operating petitioner) through ability to file consolidated income tax returns, and like benefits.

We submit that this Court should pass on the important Federal question of the meaning of the phrases used in Section 11(b)(2) and whether the Court below correctly held that such phrases could be applied to the simple essential facts here presented.

II (d). **The petitioner has been denied due process within the Fifth Amendment by being ordered to be dissolved on the basis of S. E. C. findings which are fundamentally defective on their face.** In its findings and opinion the S. E. C. comes to the conclusion that the facts fall within Section 11(b)(2), stating that it does so "On the basis of the foregoing figures" (R. 622). As appears from the "foregoing figures", the significant figure is 4.75% (R. 620) which the S. E. C. says is the percentage of the capitalization of the petitioner's subsidiaries, "as adjusted", owned by the petitioner. On the face of the opinion, the 4.75% which is supposed to represent the small interest of the petitioner in the subsidiaries is not supported by anything to which the S. E. C. or the Court below was entitled to give weight.

1. The 4.75% figure is arrived at by deducting $188,425,387 as the amount of hypothetical write-ups of assets and $94,821,042 as the amount of hypothetical deficiencies in depreciation or retirement reserves (R. 619-20, 665). The S. E. C. carefully refrained from making any finding that these amounts are properly deducted. The findings and opinion refer merely to "apparent" system write ups and to the possible necessity of an adjustment in depreciation or retirement reserves (R. 619-20). Conclusions may not be predicated on such unexplored possibilities.

2. The 4.75% figure is also fallacious in that it is applied as a blanket deduction against petitioner's total investment in subsidiaries, regardless of the character of that investment (*e.g.*, bonds or preferred stock) and is arrived at by the addition of plus and minus quantities, so that a negative investment in one subsidiary (*i.e.*, alleged insufficiency of assets to meet securities senior to those held by petitioner)

is deducted from the positive investment in other subsidiaries (R. 619-20, 665).

If these unjustified and fallacious adjustments and deductions had not been made, there would remain only the book figures which showed that the petitioner held 69% of the equity in its subsidiaries, and the excluded valuation evidence which would have shown that the petitioner held even a greater percentage of such equity, and these figures entitle the petitioner to the majority voting power in the subsidiaries.

In refusing to set aside the S. E. C. order because of these fundamental defects appearing on the face of the S. E. C. findings the decision of the Court below was in conflict with this Court's decision in *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 74 (1936) and the other decisions of this Court which are cited in that opinion.

III. **The S. E. C., and the Court below in approving its action, erred in refusing to accord the petitioner a hearing on its plan of reorganization.** We submit that this action of the S. E. C. sustained by the Court was a clear abuse of the statutory processes outlined in Section 11 considered as a whole, and an express denial to petitioner of the rights accorded to it by Section 11(e). Without extended argument it seems clear that the procedure envisaged by Congress in enacting Section 11 was that the S. E. C. should first make a comprehensive survey of each public utility system and find wherein it fails to conform to the Act and indicate the "steps" required to be taken to align it with the statutory requirements. Thereupon two alternatives are presented. Under Section 11(b), either (1) or (2), or both, the S. E. C. may make an order defining those steps and requiring the company to conform thereto,

or the company may submit, under Section 11(e), a plan of compliance. As will appear hereinafter, the S. E. C. failed to define the steps required to be taken by petitioner to comply with the sub-section. It also refused a hearing on the plan presented by petitioner proposing a method of compliance (R. 532-3).

IV. **The Court below erred in refusing to consider certain contentions of the petitioner on the ground that they were not argued before the S. E. C.** An important contention which the Court below refused to consider was the contention that Section 11(b)(2) was not intended by Congress to authorize dissolution of any corporation. The Court below based its determination that it would not consider this question (which, with the other questions not considered, will be discussed in Point "V" below) on the following sentence in Section 24(a) of the Act:

> "No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do."

We think that the Court below wholly overlooked the latter portion of this sentence of the statute relating to the existence of reasonable grounds for not detailing objections before the S. E. C. The S. E. C. had already entered a series of similar dissolution orders in other cases, thus repeatedly deciding that it had the power under Section 11(b)(2) to order dissolution and to enter the form of order entered in the present case. In the summer of 1942 the proceeding against the petitioner had gone on for over two years, the record already included over 18,000 pages of testimony and 2,400 exhibits, the parties were fully advised of each others' views, and counsel for petitioner entered

into an agreement with S. E. C. counsel for closing the voluminous record. Shortly thereafter, proposed findings were presented to petitioner and contained a dissolution order of the type which the S. E. C. had entered in other proceedings. To bring the case to a close without further formality or delay, the petitioner reserved by stipulation with S. E. C. counsel "full judicial review of the said findings, opinion and order" of the S. E. C. (R. 521). This is recognized by the findings and opinion of the S. E. C. in its statement that "Respondents do not acquiesce in the present findings and conclusion or in the order to be entered hereon, and that they expressly reserve all legal and constitutional rights" (R. 528). This was clearly an acknowledgment of notice to the S. E. C. that the petitioner reserved the right to challenge, on all available grounds, its legal authority to dissolve the petitioner.

Furthermore, the questions which the Court below refused to consider are pure questions of law presented by the text of the statute itself, and the stipulation with S. E. C. counsel, the statement in the S. E. C. opinion, the line of decisions theretofore rendered by the S. E. C., and the other surrounding facts should have been held to constitute adequate notice to the Commission of the reservation of these questions, and a good and sufficient reason for failure to make any further or more specific challenge such as the Court below holds was required.

We submit that, in these circumstances, it was a denial of justice to penalize the petitioner for expediting the proceeding as set forth above.

We further submit that such a question as whether Section 11(b)(2) authorizes the S. E. C. to order dissolution of any corporation is not the type of question which falls within the above quoted sentence from Section 24(a). If

the S. E. C. is not granted the power to direct dissolution by statute, then its order is *ipso facto* void. That question is in its nature jurisdictional since it goes to the power to make the order.

V (a). **Section 11(b)(2) does not authorize the S. E. C. to direct dissolution of any corporation.** There is no reference in Section 11(b)(2) or in any other portion of the Act to any authority being granted to the S. E. C. to dissolve any corporation. The fact is that there was a purported grant of such authority to the S. E. C. in the original bills introduced in the Senate and the House, but these were stricken from the bill finally passed by Congress.

The statement in clause 1(e) of the Act that one purpose of Congress was "to provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided in this title" cannot be construed to sustain the power to *dissolve* corporations, particularly in the face of Congressional action removing authority to dissolve from Section 11(b)(2). There is no reference in the clause just quoted to dissolution of any corporation but simply to "elimination" of holding companies, "except as otherwise expressly provided." The meaning of "to eliminate" is not "to destroy" but is "to thrust out", "to remove and get rid of by disengaging from environment or associations" (Webster's New International Dictionary, Second Edition). A holding company can be eliminated simply by making it divest itself of stock in an operating company or in an intermediate holding company or give up its vote on such stock. Carrying out the provisions of Section 11(b)(1) eliminates holding companies to a substantial degree, limiting existence generally to one integrated public utility system, as defined in the Act.

In any event, the action of Congress in striking out express authority to dissolve corporations from Section 11(b)(2) before passage of the Act, is controlling and precludes its reinstatement by judicial construction.

Pennsylvania Railroad Co. v. *International Coal Mining Co.*, 230 U. S. 184 (1913);
Carey v. *Donohue*, 240 U. S. 430 (1916);
Helvering v. *Wood*, 309 U. S. 344, 348 (1940).

We submit that this Court should decide the important Federal question whether Section 11(b)(2) authorizes the S. E. C. to dissolve any corporation.

V (b). **The S. E. C. dissolution order is void because it is unenforceable.** The S. E. C. by its order directed the petitioner and Bond and Share to effect the dissolution of the petitioner. They are powerless to do so. Under the laws of the State of Maine, where the petitioner is incorporated, a corporation can be dissolved only by order of a Court of the State of Maine and after affirmative vote of stockholders in favor of dissolution at a meeting called for the purpose, at which a quorum, consisting of the holders of a majority of the voting stock, must be present in person or by proxy (Maine Revised Statutes (1930), Chap. 56, Sec. 90), or by a court of the State of Maine under other circumstances not relevant here, such as insolvency (Id., Sec. 83).

Under these statutes of Maine, the petitioner is powerless to effect its own dissolution and Bond and Share is also powerless to dissolve the petitioner since it has only 20.7% of the voting power in American.

Furthermore, under the enforcement provisions of the Act contained in Sections 11(d) and 18(f), the Federal Courts cannot take jurisdiction to enforce this order which

petitioner and Bond and Share cannot carry out under the Maine statutes.

V (c). **The form of the S. E. C. order is improper under Section 11(b)(2).** Section 11(b)(2) directs the S. E. C. in an order under that sub-section to require that the corporation "shall take such steps as the Commission shall find necessary to ensure * * *". The S. E. C. order for dissolution of petitioner merely provides that the petitioner shall be dissolved and that the petitioner and Bond and Share shall submit a plan and take such other steps as may be necessary to effectuate the order (R. 651). Therefore, the S. E. C. order does not conform to Section 11(b)(2) because it fails to specify the steps to be taken by the petitioner in carrying out the order, but on the contrary leaves those steps for later formulation. We submit that the Court below should have held that the failure of the S. E. C. to specify in its order the "steps" to be taken as required by Section 11(b)(2) made the order void. The practical effect which the S. E. C. seeks to accomplish by this form of order is to deprive petitioner of the statutory time (one to two years) allowed by the statute for accomplishment of the concrete steps which the statute requires the S. E. C. to specify.

Conclusion.

It is respectfully submitted that the petition for a writ of certiorari should be granted.

ARTHUR A. BALLANTINE,
JOHN F. MACLANE,
FRANK A. REID,
Counsel for Petitioner.

June 16, 1944.

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Supreme Court of the United States

OCTOBER TERM, 1945

No. 6.

AMERICAN POWER & LIGHT COMPANY,
Petitioner,

against

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

BRIEF FOR PETITIONER.

Preliminary Statement.

This cause is before this Court on writ of certiorari to review a decree of the United States Circuit Court of Appeals for the First Circuit, entered on March 17, 1944.*

This decree affirmed an order of the Securities and Exchange Commission (herein called the "S. E. C."), entered in a proceeding initiated by the S. E. C. under Section 11(b)(2) of the Public Utility Holding Company Act of 1935 (herein called the "Act") which order directed dissolution of the petitioner, American Power & Light Company (herein called "American").

* Record consolidated with record in case No. 7 (October Term, 1945), *Electric Power & Light Corporation* v. *Securities and Exchange Commission.*

The so-called death sentence provision of the statute here attacked, i.e., Section 11(b)(2) of the Act, and the procedure under that provision, present questions that are novel before this Court.*

Opinions Below.

The opinion of the United States Circuit Court of Appeals for the First Circuit (R., Vol. IV, 869-899) was rendered on March 17, 1944, and is reported in 141 F. 2d 606. On April 18, 1944, that Court entered an order denying American's application for rehearing (R., Vol. IV, 901).

The opinion of the S. E. C., rendered August 22, 1942 (R., Vol. II, 523-649), is reported in 11 S. E. C. 1146. On August 28, 1942, the S. E. C. denied American's application for rehearing (R., Vol. II, 677-678).

Jurisdiction.

Jurisdiction to review the order of the S. E. C. was specifically conferred on the Circuit Court of Appeals for the First Circuit (American being a corporation of the State of Maine within said Circuit) by Section 24(a) of the Public Utility Holding Company Act of 1935 (15 U. S. C. §79x(a)), which likewise confers upon this Court jurisdiction to review upon certiorari the judgments and decrees of the Circuit Court of Appeals, as provided in Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. §347).

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* Counsel for American, as *amici curiae*, have filed a brief in the *North American* case, involving Section 11(b)(1), which is being simultaneously presented to this Court. Such brief was filed March 30, 1943, before it was known that the cases would be presented together and contains in condensed form some of the arguments made herein.

Petition for writ of certiorari was filed in this Court on June 16, 1944, and was granted by order entered May 28, 1945.

Statute Involved.

The statute involved is the Public Utility Holding Company Act of 1935 (49 Stat. 803; 15 U. S. C. §79).* The order of the S. E. C. was made under Section 11(b)(2) of the Act (49 Stat. 820-821; 15 U. S. C. §79k(b)(2)). The portion of Section 11(b)(2) directly involved reads as follows:

> "(b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:
>
> * * * * * *
>
> (2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. * * *"

Issues Presented.

Broadly speaking, and without limiting the detailed statement hereinafter made in the "Specification of Errors", the issues presented fall into two categories, viz:

1. *Section 11(b)(2) is unconstitutional,* because it takes property of American and its security holders without payment of just compensation, it is not an exercise of any

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* Printed pamphlets containing copies of the Act in full will be submitted with this brief.

Federal power, and it is a delegation of legislative power without any standards for guidance.

2. *The proceedings before the S. E. C. and the dissolution order are invalid,* because they violate the due process clause in that the S. E. C. itself has not developed any standards for action under Section 11(b)(2), the S. E. C. denied American a hearing on certain of the issues necessarily involved, and dissolution of American is an unreasonable and oppressive means of remedying alleged defects in the Bond and Share System; because the dissolution order is not supported by substantial evidence; and because dissolution of a corporation is not authorized by the terms of Section 11(b)(2).

Description of American.

American is a "registered holding company" and is itself the parent of a "holding-company system" under the terms of the Act by reason of holding substantially all of the common stock of 16 subsidiary operating utility companies (R., Vol. I, 33; Vol. II, 539, 541). Because of the ownership of a small portion of the securities (more than 10 percent of the voting shares) of the petitioner by Electric Bond and Share Company (herein called "Bond and Share") the petitioner is by statutory definition (Section 2(a) 7-9) a subsidiary of Bond and Share, and as such is a member of the Bond and Share holding company system.

It should be borne in mind that the single ultimate issue framed by the S. E. C.* for its own determination in this proceeding was whether the existence of *American Power & Light Company* should be terminated in order to ensure,

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* Orders of May 9, 1940 (R., Vol. I, 27-54) and June 7, 1940 (R., Vol. I, 65-66).

in the language of Section 11(b)(2) of the Act, that the structure of the holding company system of *Bond and Share* should not be unduly or unnecessarily complicated, or voting power unfairly or inequitably distributed among security holders of *that System.*

The following description is summarized principally from the S. E. C.'s Findings and Opinion:

American was organized in 1909 in Maine and immediately following its organization acquired certain local utility companies in Kansas and Oregon. From the time of this initial acquisition to December 31, 1941, American and subsidiaries have acquired 427 companies or properties which have been combined and simplified into 16 direct utility and 6 direct non-utility subsidiaries* (R., Vol. II, 406, 411, 451-452, 539).

As of December 31, 1941, the public utility subsidiaries of American served with electricity approximately 148 communities of a population of 2,500 or over, and served with gas some 26 such communities, the total population of the communities so served being approximately 2,740,000. These communities are located in 14 states with the principal operations being in the Pacific Northwest, including Montana, and in Arizona, Texas, Kansas-Nebraska, Minnesota-Wisconsin, and Florida (R., Vol. II, 541-542).

Through the issuance of securities for properties and through sale of securities to the public for cash, the capi-

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* These utility subsidiaries as of that date were: Central Arizona Light & Power Company, Florida Power & Light Company, Kansas Gas and Electric Company, Minnesota Power & Light Company, The Montana Power Company, Nebraska Power Company, New Mexico Electric Service Company, Northern Power Company, Northwestern Electric Company, Pacific Power & Light Company, Portland Gas & Coke Company, Superior Water, Light and Power Company, Texas Electric Service Company, Texas Power & Light Company, Texas Public Utilities Corporation and The Washington Water Power Company.

talization of American grew from the initial $8,000,000 in 1909 to $263,101,529 twenty years later, and consolidated assets of American and its subsidiaries expanded from approximately $9,800,000 to $754,129,787 (R., Vol. II, 560-561).

At December 31, 1941, these consolidated assets were carried at $851,251,525 (R., Vol. II, 540) and the consolidated capitalization of American and such subsidiaries as of the same date was as follows (R., Vol. II, 539-540):

Long-Term Debt:	
American	$ 45,849,000
Subsidiaries	311,437,072
Preferred Stocks:	
American	177,145,326
Subsidiaries	111,622,100*
Minority interest	621,193
Undeclared Cumulative Dividends on Preferred Stock of Subsidiaries held by Public	3,615,226
Common Stock: American	37,434,351
Capital Surplus	36,026
Earned Surplus	45,968,643
	$733,728,937

* Erroneously printed in Record as $11,622,100.

American owns high percentages of the voting stocks of its utility subsidiaries, in most cases 90% or upwards (R., Vol. II, 541). The aggregate par, stated or assigned value of all securities of its subsidiaries owned by American as of December 31, 1941 was $260,227,223, and their book value on the books of the issuers, including surplus and preferred dividend arrearages, was $304,787,950. American carried these securities in its investment account at $251,537,054 (R., Vol. II, 540).

The subsidiaries of American have outstanding in the hands of the public $311,437,072 of bonds and $110,032,100

of preferred stocks (excluding reacquired preferred stocks) (R., Vol. II, 539-540; pp. 1, 3, of Exhibit D to 1941 form U5S of American*; R., Vol. I, 262).

The capitalization of American itself as of December 31, 1941 was as follows:

Debenture Bonds (issued and assumed)	$ 45,849,000.00
Preferred Stock (stated value)	177,145,326.00
Common Stock (stated value)	37,434,351.29
Surplus	10,064,934.07
Total capital and surplus	$270,493,611.36
Unpaid cumulative dividends in arrears	$ 35,114,788.00

(R., Vol. II, 537.)

American is eminently solvent, and is the investment medium of 45,000 public investors,—stockholders and bondholders (R., Vol. II, 537; Tr. 1968). Of its $225,000,000 book value of outstanding stocks, over $215,000,000, or more than 95½%, and all its Debentures ($45,849,000 at December 31, 1941) are owned by the general public. *Less than $10,000,000, or less than 4½% in book value, of its stocks are owned by one corporation, Bond and Share.*** It is this 4½% holding only (representing more than 10% of voting power) which makes American and its subsidiaries part of the Bond and Share System by statutory definition.***

Prior Proceedings Herein.

The proceedings resulting in the orders here brought under review were instituted by the S. E. C. on May 9, 1940, by a "Notice of and Order for Hearing Pursuant to Sec-

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* References to material other than the printed record are to exhibits and testimony on file in this Court which, pursuant to stipulation of the parties, are part of the record before this Court.

** Figures taken from Findings and Opinion of the S. E. C. (R., Vol. II, 537-538). Bond and Share itself is owned by over 100,000 holders of preferred and common stock, no one of whom owns as much as 1% of the stock of Bond and Share (Exhibit F(d), p. 9, to Form U5S of Bond and Share for period ended December 31, 1939).

*** Bond and Share has 20.7% of the voting shares.

tion 11(b)(2) of the Public Utility Holding Company Act of 1935" (R., Vol. I, 27-54). Under S. E. C. practice this document serves the combined functions of complaint and process.

This notice and order was entitled "In the Matter of Electric Bond and Share Company, American Power & Light Company", and other subsidiary holding companies of the Bond and Share System. That System was described as including the following subholding companies: American Power & Light Company, Pacific Power & Light Company (a subsidiary of American), Electric Power & Light Corporation, Utah Power & Light Company (a subsidiary of Electric Power & Light Corporation), National Power & Light Company, American & Foreign Power Company Inc., and also American Gas and Electric Company (R., Vol. I, 29), and the operating subsidiaries of each of these companies (R., Vol. I, 34-47).*

The ultimate concrete allegations upon which the charges of "undue and unnecessary complication of structure" and "unfair and inequitable distribution of voting power" (R., Vol. I, 49) were apparently predicated, included statements of the capital structure of system companies, and of the disparity between the values of the voting securities of American held by Bond and Share and the total values of the consolidated assets of American, and between the

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* American Gas and Electric Company was not made a party to the proceedings for reasons stated in the notice and order (R., Vol. I, 47). By order dated June 7, 1940, the Commission directed that the hearing should be limited initially to issues concerning American, Electric Power & Light Corporation, National Power & Light Company and American & Foreign Power Company, Inc. (R., Vol. I, 65-66). By order dated June 17, 1940, American & Foreign Power Company, Inc., was dismissed as a party to the proceeding (R., Vol. I, 79). On August 27, 1941, at the conclusion of the hearings involving National Power & Light Company, that company was ordered dissolved and accepted the order. Thus the proceedings in their present form involve only American and Electric Power & Light Corporation.

stated values of the voting securities in its subsidiaries held by American and the consolidated capitalization of American and its subsidiaries.

A hearing was ordered to determine whether these allegations were true, and generally what action was necessary to be taken by respondents to ensure that their corporate structure or continued existence did not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of the *Bond and Share System* (R., Vol. I, 50). A further order of June 7, 1940, entered before the hearings began, limited the issue to "whether it is necessary to disdiscontinue the existence" of American in order to ensure these results (R., Vol. I, 65-66). *We emphasize that it is solely the effect of or position of American in the Bond and Share System, and not its position or effect within its own system, that was presented by the S. E. C. for its own determination.*

The form of this June 7, 1940 order further poses one of the fundamental questions in this case. It does not quote or correctly paraphrase the language of Section 11(b)(2) of the Act (see page 3, *supra*) which authorizes the S. E. C. to determine whether the "corporate structure or continued existence of any company in the holding company system" unduly or unnecessarily complicates structure or unfairly or inequitably distributes voting power. It is *corporate structure or continued existence in the system* and not the *corporate existence* of the company which the Act provides may be dealt with by the S. E. C. There is no express provision for dissolving any company contained in the Section. The order here under review is directed solely to the corporate existence of American and not to its divorce from the Bond and Share System.

In this connection we shall also contend that by the express provisions of Section 11(b)(1) of the Act, holding companies are given the right to retain at least one integrated system as defined in Section 2(a)(29) and such additional systems as the S. E. C. authorizes within the limitations of Section 11(b)(1), thus denying to the S. E. C. the right to liquidate such companies and terminate their existence entirely. This right is further confirmed by Section 11(e) authorizing companies to offer plans of compliance with Section 11(b) and providing for a hearing thereon.

Hearings were commenced on June 18, 1940. The S. E. C.'s case consisted of a mass of documentary evidence upon which an accounting witness presented exhibits in an attempt to support the allegations of the notice and order as to the ratios between values of the holdings of Bond and Share, American and other subholding companies to the consolidated capitalizations of these systems (R., Vol. I, 122-170). At its conclusion the respondents (including American) filed a motion to dismiss (R., Vol. I, 216, 345-353) (which was reserved for determination by the S. E. C. on final submission of the case, and was disposed of by the S. E. C. in its decision (R., Vol. II, 529-531)), and an amended answer (R., Vol. I, 217, 353-385). Both of these documents challenged the sufficiency of the allegations (or proof) offered by the S. E. C. to support an order terminating the existence of American, and the power of the S. E. C. to dissolve any of the respondents, and set forth constitutional and other legal objections to the proposed order.

Thereupon the hearings continued to their conclusion on August 22, 1942. The transcript of testimony covered over 18,000 typewritten pages, and included reference to more than 2,000 exhibits (R., Vol. I, 229). By stipulation of the

parties, all this detailed testimony was not printed, but is part of the record before this Court.

Generally the testimony and exhibits not printed comprised evidence offered by respondents, including American, as to the history, development and accomplishments of their systems, and extensive cross-examination by S. E. C. counsel seeking to minimize these accomplishments, but directed specifically to criticism of their asset accounts from an investment standpoint and seeking to show "write-ups" of capital accounts, and inadequacy of retirement or depreciation reserves as measured by comparisons with allowances or claimed allowances for income tax purposes. To meet this cross-examination, American offered testimony of present values, and a determination of depreciation in, and earnings of, its system companies, which evidence was rejected by the Examiner (R., Vol. I, 234-263) and by the S. E. C. (R., Vol. II, 532).

Further, as an alternative to dissolution, American during the course of the hearings filed a Plan under Section 11(e) of the Act for the reorganization of its system (R., Vol. II, 400-449), and an application for consolidation of hearings upon this Plan with the pending proceedings (R., Vol. I, 385-392).

At the final hearing on August 22, 1942, stipulations were made with counsel for the S. E. C. that the record should be deemed closed, and that the S. E. C. might proceed to enter its findings, opinion and order without further formality. The stipulation waived the filing of requests for findings, and further exceptions thereto, and the filing of briefs or oral argument, but reserved "all legal and constitutional rights, including [the] right to full judicial review of the said findings, opinion and order" (R., Vol. II, 520, 521). The S. E. C. opinion recognizes this reservation (*ib.* 528).

Thereupon and on the same day the S. E. C. filed its Findings and Opinion, concluding that the petitioner here should be dissolved on the statutory grounds of "undue and unnecessary complication of structure," and "unfair and inequitable distribution of voting power," in the Bond and Share System (R., Vol. II, 523-649), and entered its order (R., Vol. II, 650-652) that the existence of American "shall be terminated and that said company shall be dissolved". The Findings and Opinion and the order of the S. E. C. denied American's motion to dismiss, holding that the constitutionality of the statute was not for its determination, and overruled *seriatim* the other contentions of the motion (R., Vol. II, 529-531). They sustained the ruling of the Examiner rejecting evidence of value offered by American (R., Vol. II, 532), and denied the motion to consolidate its application for approval of the Plan submitted by it with the pending proceedings (R., Vol, II, 533). On August 28, 1942, the S. E. C. denied American's petition for rehearing (R., Vol. II, 677-678).

American on October 20, 1942, filed in the Circuit Court of Appeals for the First Circuit its petition for review of the S. E. C.'s order (R., Vol. I, 1-12) upon which the decision (R., Vol. IV, 869-899) and decree of the Court (R., Vol. IV, 900) here under review were entered as hereinbefore stated.

Analysis and criticism of the S. E. C.'s Findings and Opinion, which have been accepted by the Court below as conclusive except upon constitutional issues, is deferred to the argument hereinafter made. It is sufficient to state here that the Findings and Opinion answer in the affirmative the issue posed by the order for hearing, as limited by the subsequent order of June 7, 1940, viz., that the existence of *American* shall be terminated and the company dissolved in order to simplify the structure and

correct distribution of voting power in the *Bond and Share* System, on the ground that the latter company, with a negligible investment, seized at organization and has perpetuated control of *American* (which has about 45,000 public security holders whose securities represent over 95½% of the investment in American and its subsidiaries).

Specification of Errors.

It is submitted that the Court below erred in sustaining the order of the S. E. C. over the following objections:

I. Section 11(b)(2) violates the Fifth Amendment by taking property of American and its security holders without payment of just compensation and without giving security holders the right to notice and a hearing; and the Section cannot be upheld as a reorganization statute (Specification I(b)*).

II. Section 11(b)(2) does not rest, or purport to rest, on the Federal power over interstate commerce, or any other Federal power, and is therefore unconstitutional (Specification I(a)).

III. The drastic grant of power, without standards, contained in Section 11(b)(2) violates the due process clause and is an unconstitutional delegation of legislative power (Specification I(c)).

IV. The order of dissolution violates the due process clause, is not authorized by Section 11(b)(2), and is not supported by substantial evidence:

(a) No standards have been developed or announced by the S. E. C. on the basis of which there is any "unfair or

* These references are to specifications contained in American's petition for the writ of certiorari (pp. 4-6).

inequitable distribution of voting power" or "undue or unnecessary complication of structure" which would be remedied by the dissolution of American (Specification II(c));

(b) To the extent that the order rests on statements in the Findings and Opinion regarding past lawful acts, Section 11(b)(2) is an unconstitutional *ex post facto* law (Specification I(d));

(c) Purported findings relied on by the S. E. C. to support its order are fundamentally defective on their face (Specification II(d));

(d) The order rests on statements in the Findings and Opinion regarding values and violates the due process clause, since American was denied a hearing on this issue (Specification II(b));

(e) The S. E. C. arbitrarily refused to hold hearings on American's voluntary Plan for reorganization (Specification III);

(f) Section 11(b)(2) does not authorize the S. E. C. to direct dissolution of a corporation, an objection which the Court below erred in refusing to consider (Specifications IV and V(a)); and

(g) Dissolution of *American* is an unreasonable, arbitrary and oppressive means of remedying alleged defects in the *Bond and Share* System (Specification II(a)).

Summary of American's Position Before This Court.

The validity of the registration provision of the Act (Section 5) is not challenged. American registered under this provision and thereby became subject to the require-

ments to furnish information regarding itself and its subsidiaries.

Every conceivable activity of American and its subsidiaries since passage of the Act has been, and will be, subject to regulation under the regulatory provisions of the Act (Sections 6-10, 12, 13 and 15 of Title I, and Title II).* The validity of these provisions regulating activities also is not being challenged.

What is here challenged is the validity of Section 11(b)(2) and of the order for dissolution of American.

No one contends that anyone in the situation has violated any law except as the system structure is claimed presently not to conform to the requirements of Section 11(b)(2). The public security holders of American, as contrasted with *Bond and Share,* are not claimed to have committed, prior to enactment of the statute, acts now in any way condemned.

Yet by the order of a Federal administrative agency, the S. E. C., the $270,000,000 solvent corporation, American, which has violated no law, is singled out for dissolution. The consequent taking for a social-economic public purpose of a large amount of property belonging to the corporation and to its public security holders (including (a) the corporation's franchise, its right to exist, its organization and financing costs, the substantial assemblage and going-concern values, and its right to hold its investments and,

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* In Title I, Sections 6 and 7 regulate the issuance and sale of securities by holding companies and their subsidiaries; Sections 8, 9 and 10 regulate all acquisitions of securities and utility assets by holding companies and their subsidiaries; Section 12 regulates all intercompany transactions, sales of utility assets, dividends and proxy solicitation, Section 13 regulates all service, sales and construction contracts; Section 15 regulates the keeping of all accounts and records (except to the extent such regulation is delegated to the Federal Power Commission under Title II); Title II regulates, through the Federal Power Commission, interstate sales of electric energy by operating subsidiaries of a holding company system, as well as their cost accounting in connection with such sales.

(b) the security holders' investments in American) is effected without payment of just compensation. It would take place under a statute giving security holders no right to notice and a hearing.

This taking under the first sentence of Section 11(b)(2)* is not by way of regulating future activities of a holding company system, all of which are regulated in every detail by the other provisions of the Act referred to.

The taking of the property of American and its security holders proceeds on the basis that it will remedy, in the language of the provision, "unfair or inequitable distribution of voting power" or "undue or unnecessary complication of structure" in the *Bond and Share System*. But the taking is not predicated in any way by Congress or by the S. E. C. on such alleged "unfair or inequitable distribution of voting power" or "undue or unnecessary complication of structure" having any effect on interstate commerce, or on the taking having any effect on such commerce.

No standard is set forth in the statute itself as to what is "unfair or inequitable distribution of voting power" or "undue or unnecessary complication of structure".

If it may constitutionally be left to a Federal administrative agency to develop such standards, it will still be found that the S. E. C. has not developed or announced any standard as a basis for determining that there is in this case any "unfair or inequitable distribution of voting power" or "undue or unnecessary complication of structure." The S. E. C. does not state what features in the Bond and Share System constitute "unfair or inequitable distribution of voting power" or "undue or unneces-

* The "great grandfather" clause, forbidding four-layer systems, consisting of the second sentence of Section 11(b)(2), is not involved in this case.

sary complication of structure." The S. E. C. continuously repeats the statutory phrases, but makes no statement of what they mean. All that can be gathered from its "Findings and Opinion" is that, in the judgment of the S. E. C., the holdings of Bond and Share represent too small a financial interest (less than 4½%) in American or American's own system as compared with the voting power exercised by Bond and Share (20.7%), and that in some cases there are too many layers of securities in the consolidated capital structure of the Bond and Share System.

There is no valid explanation by the S. E. C. why American should be destroyed and its property and that of its public security holders taken to remedy unspecified defects in the Bond and Share System, due entirely to the holding by Bond and Share of 4½% in book value of the stocks of American, or the superimposition of Bond and Share's corporate structure over that of American and the latter's subsidiaries. Obviously American and its system would not be part of or affect the Bond and Share System and the property of American and its public security holders would not be destroyed, if the S. E. C. simply ordered Bond and Share not to vote its small holdings in American or required Bond and Share to dispose of them. The action taken by the S. E. C. is demonstrated to have been arbitrary by its subsequent commencement of a proceeding against Bond and Share to destroy the Bond and Share System entirely by requiring Bond and Share to divest itself of its holdings in its two remaining holding company subsidiaries (Holding Company Act Release No. 4305, May 19, 1943), and by the fact that Bond and Share has itself begun a proceeding before the S. E. C. to divest itself of all its holdings in American (Holding Company Act Release No. 5970, August 6, 1945).

The selection by the S. E. C. of the course of dissolving American is doubly oppressive in light of the legislative history of Section 11(b)(2), which indicates that Congress did not intend to authorize dissolution of any corporation thereunder.

It was arbitrary and oppressive for the S. E. C. to refuse to hold hearings on American's voluntary Plan for reorganization to remove any objections the S. E. C. might have under Section 11 to the corporate structure of American.

The S. E. C. Findings and Opinion do not contain genuine findings of fact. Instead, the S. E. C. terms such figures as it does use "not conclusive."

In place of findings, the S. E. C. sets forth at length (a) the history of action lawfully taken in the past in the building up of the Bond and Share System now deemed to constitute abuses, and (b) statements purporting to have a bearing on values of various security interests in the Bond and Share System, on which latter subject the S. E. C. refused to hear substantial evidence offered by American. Accordingly, the dissolution order of American based on such Findings and Opinion must further be invalid either (a) as an application of Section 11(b)(2) as an unconstitutional *ex post facto* law, or (b) as the result of an adjudication of an issue on which American had no fair hearing.

The order of dissolution, the administrative process through which it was issued, and the statutory provision upon which such process and order were based, are all entirely novel.

Section 11(b)(2) has no apparent relation to any of the delegated substantive powers of the Federal Government such as the interstate commerce power, it contains no acknowledgment of any of the restraints imposed on the

exercise of such powers by the Fifth Amendment, and it lays down no standards by which the action of the agency, the S. E. C., is to be governed.

Under the statute the Federal administrative agency, the S. E. C., has proceeded without any regard to the presence or absence of any jurisdictional findings showing any effect on interstate commerce, without itself developing or announcing any standards in the absence of statutory standards, without making any basic findings to support its order, and without granting a hearing on what apparently was the critical issue in the proceeding. Instead, the Federal administrative agency bears down on action lawfully taken in the past by others than American and its public security holders, and then selects the most oppressive and unreasonable remedy conceivable, directed not against the authors of such action, but against its victims.

If this type of statutory provision and type of process and order can be applied to corporations in the utility field, they can be applied to corporations and individuals in every field.

This is not to quarrel with the provisions of the Act regulating all of the activities of holding companies and their subsidiaries or with the broad concept of the interstate commerce power, including prohibition of acquisition of ownership or control of corporations affecting interstate commerce and the destruction of combinations made in violation of such prohibitions, or with reasonable process by Federal administrative agencies in accordance with valid standards not based on retroactivity, and the selection by them, after fair hearing, of reasonable means of carrying out their Congressional mandates.

The extraordinary statutory provision here involved has been the subject of controversy before the Commission

and Federal courts for the past ten years without authoritative ruling by this Court. It now seems time to examine this novel provision and the administrative process used in its enforcement in all their constitutional aspects.

The Court below did not give dispassionate consideration to the questions presented. Instead, after the lapse of nine months (including a summer recess) following the argument, it rendered an opinion (R., Vol. IV, 869-899), repeating through copious quotations the heated declarations of the S. E. C. regarding the past activities of Bond and Share and giving pragmatic sanction to the action taken by the S. E. C., thus leaving the real questions at issue to be determined by this Court. While it appears that the Court may not have been entirely satisfied either with some of the rulings or conclusions of the S. E. C., or the remedy of dissolution of American to atone for the alleged sins of Bond and Share (R., Vol. IV, 888-890), it deferred in these respects to the "expert judgment" of the S. E. C., and refused to concern itself with the consequences of the order under review upon American or its security holders. Such meager statements of the Court below (and other Circuit Courts of Appeals) as bear upon the real questions presented will be discussed under the respective points.*

None of the constitutional or other questions presented on this petition for review has been passed upon by this

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* We know of no opinions of the Circuit Courts of Appeals having any bearing on the questions regarding Section 11 presented here, other than the decision below in this case, the decision in the *North American* case being simultaneously presented, and the decision in *Commonwealth & Southern Corporation* v. *Securities and Exchange Commission*, 134 F. 2d 747 (C. C. A. 3, 1943). The decisions in three other cases involving some of these questions rest expressly upon the opinions in the aforementioned cases, or some of them. *United Gas Improvement Co.* v. *Securities and Exchange Commission*, 138 F. 2d 1010 (C. C. A. 3, 1943); *Engineers Public Service Company v. Securities and Exchange Commission*, 138 F. 2d 936 (C. of A., D. C., 1943); *Central and South West Utilities* v. *Securities and Exchange Commission*, 136 F. 2d 273 (C. of A., D. C., 1943).

Court in relation to Section 11(b)(2) of the Act.* We believe that analogous questions have been passed upon by this Court in relation to other acts and types of proceedings, in each instance with a result favorable to the position taken by American on the questions here.

The S. E. C. may urge upon the Court that a number of proceedings have been had under Section 11, and particularly Section 11(b)(2), in which the orders of the S. E. C. have been consented to or not contested in the courts, or have been sustained in the Circuit Courts of Appeals and no applications for writs of certiorari filed, with a view either of indicating general acceptance of the validity of the Section or that many transactions have been effected on the assumption of validity which might be upset by a contrary holding of this Court.

There would be nothing to such an argument here. The reasons which impelled officers, directors and security holders of various corporations to consent to S. E. C. orders under Section 11(b)(1) or Section 11(b)(2), or not to contest them in the courts or only through the Circuit Courts of Appeals, cannot be examined into and are the subject only of conjecture.** The other branch of the argument would also not be sound. There is no general body of commercial transactions entered into in reliance on the validity of Section 11. All such past transactions have been under

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* Both the majority and minority of this Court expressly stated that constitutional questions were not considered in *Otis & Co.* v. *Securities and Exchange Commission*, 323 U. S. 624, 640, 645 (1945). In that case this Court considered only a narrow point as to the relative rights of holders of preferred and common stock in a liquidation resulting from application of the "great grandfather clause" of Section 11(b)(2), not involved here.

** The power assumed by the S. E. C. in connection with Section 11 proceedings to determine whether the continuance of officers and directors of a holding company was permissible in similar positions with operating subsidiaries or remaining holding companies after the entry of an order under this Section [e. g. Holding Company Act

S. E. C. or court order, and by reason of the doctrine of *res adjudicata* are in no way voidable. Any future transactions must be governed by the principles laid down by this Court in this case.

Nor has American delayed in raising the question of the constitutionality of Section 11. American and Bond and Share tried to raise that question, along with the question of the constitutionality of the registration provisions of the Act, in the first case under the Act decided by this Court in 1938, *Electric Bond and Share Company* v. *Securities and Exchange Commission*, 303 U. S. 419 (1938), but were prevented from doing so by the insistence of the S. E. C. that Section 11 was separate from the registration provisions and presented different questions. Since then the time has been taken up with proceedings before the S. E. C. and in the Circuit Court of Appeals, and there has been a lack of a quorum to hear these cases in this Court.

Release No. 5688, March 29, 1945], may well have exercised an influence in some such cases. Also influential may have been the power asserted by the S. E. C. to enter accounting orders substantially impairing the ability of subsidiary companies to pay dividends [e. g. Holding Company Act Release No. 4791, Dec. 30, 1943], and the power asserted by the S. E. C. relating to subordination of securities owned by holding companies to securities outstanding in the hands of the public [e. g. Holding Company Act Release No. 4648, Oct. 29, 1943.]

Furthermore, in many cases dissolution of a holding company is of no great importance to it, because its principal asset is the stock of one other company, and such other assets as it may have are simply vestigial appendages. This was the situation in the *Otis* case cited in the preceding footnote.

The S. E. C.'s Findings and Opinion in this case refer (R., Vol. II, 527) to an order of dissolution of National Power & Light Company entered August 23, 1941, and its acceptance by that Company, but the circumstances there were not analogous to those relating to American. National Power & Light Company had disposed of many of its important properties in the Central Southern States in the area covered by the T. V. A., and believed it could work out its remaining problems under the order of dissolution which it was, therefore, willing to accept.

ARGUMENT.

I. Section 11(b)(2) violates the Fifth Amendment by taking property of American and its security holders without payment of just compensation and without giving security holders the right to notice and a hearing; and the Section cannot be upheld as a reorganization statute.

All the future activities of American and its subsidiaries, if continuing, are regulated by other provisions of the Act, not challenged here (Sections 6-10, 12, 13 and 15 of Title I, and Title II). These are separate and apart from Section 11, the disintegration or reorganization section. Section 11 is also separate and apart from the registration sections of the Act (Sections 4 and 5). That these three portions of the Act are distinct and separate was held by this Court, on the urging of counsel for the S. E. C., in the case which specifically upheld only the registration portion of the Act (*Electric Bond and Share Company* v. *Securities and Exchange Commission*, 303 U. S. 419 (1938)).*

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* The separability of, and difference between, these three portions of the Act are expressly conceded in the brief of the S. E. C. in the *North American* case which is being simultaneously presented to this Court, viz., page 2.

> "Its [the Act's] major provisions are of three types:
>
> "1. A requirement of registration of public utility holding companies which are engaged in interstate commerce or use the mails;
>
> "2. Substantive regulations of registered holding companies with respect to such matters as the issuance of securities, the sale and acquisition of assets, the payment of dividends, etc.; and
>
> "3. Corporate simplification and integration provisions as contained in Section 11 of the Act."

We here complain of a direct taking of property under Section 11, not of regulation under other provisions of the Act.

(a) The taking of property without payment of just compensation.

The order of dissolution issued by the S. E. C. under Section 11(b)(2) takes the property of American by taking away its corporate franchises, by taking away the right of American to exist under such franchises, by taking away the valuable property inhering in the great costs heretofore incurred of organizing and financing American, and by taking from American its right to retain its investments in the stocks and other securities of its subsidiaries. All of this property of American is of great value.

In addition, the property of the security holders of American is taken—the stocks of American which they hold and, in the case of the debenture holders, their right to retain their 6% debentures of American.*

These direct and separate property interests are not only of great value individually, but taken as a whole they also represent a substantial assemblage and going-concern value.** Dividend paying costs are estimated at probably one-tenth of what they would be if American's present stockholders owned individually stocks in American's subsidiary operating companies, probably $300,000 annually (Tr., 1936-1937). Also, the existence of American similarly saves stock transfer expense which would otherwise be incurred were the stocks of the subsidiaries owned directly by Ameri-

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* One such issue is not now callable by its terms; the other issue is callable by its terms with a premium of 10% (Exs. C-1 and C-2 to U5B registration statement filed by American with the S. E. C. in 1938).

** Hornstein, *Voluntary Dissolution—A New Development in Intracorporate Abuse*, 51 Yale L. J. 64, 69 (1941).

can's stockholders. The existence of American is also valuable to its security holders by permitting them to make diversified investments in the public utility field, which the small investor could not otherwise do.

All this property is under the protection of the Fifth Amendment so far as the Federal Government is concerned, and of the Fourteenth Amendment so far as the state governments are concerned.

This property is taken under Section 11(b)(2) for the declared social-economic purpose of creating theoretically ideal structures in the public utility field, "as a matter of public policy."*

It is of course fully recognized by petitioner that the Fifth Amendment (and the Fourteenth as well) does not exempt property from the effect of regulation under proper exercise of legislative authority. Permissible regulation may result in loss of value to owners of the property not requiring compensation, such loss being regarded under established doctrine as incidental and indirect, provided reasonable results are effected.**

On the other hand, it is also established that a taking in the constitutional sense under the Fifth Amendment does not have to be an actual acquisition of the property by or under government authority, but may consist of the destruction of property. This Court has recently expressly so held in *United States* v. *General Motors Corporation*, 323 U. S. 373 (1945). The Court said, page 378:

> "In its primary meaning, the term 'taken' would seem to signify something more than destruction, for it might well be claimed that one does not take

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* *Otis & Co.* v. *Securities and Exchange Commission*, 323 U. S. 624, 631 (1945).

** *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591 (1944).

> what he destroys. But the construction of the phrase has not been so narrow. The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking."

and, again, at pages 383-384:

> "An owner's rights in these are no less property within the meaning of the Fifth Amendment than his rights in land and the structures thereon erected. And it matters not whether they were taken over by the Government or destroyed, since, as has been said, destruction is tantamount to taking."

Whatever may be the basis for determining the reasonableness of regulation, it remains clear that the power of "regulation" does not justify destruction of property lawfully acquired and owned and in itself not noxious or offensive, however beneficial that destruction may be supposed to be for the public. This doctrine was applied in a recent unanimous decision of this Court, in which the first Frazier-Lemke Act was held invalid as taking property without condemnation and payment of just compensation in violation of the Fifth Amendment, *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555 (1935).

Section 11(b)(2), from the standpoint of the Fifth Amendment, is very similar to the first Frazier-Lemke Act, adopted as part of the Bankruptcy Act, which was held invalid in the *Radford* case. Under the Act, farmers' assets and financial obligations were to be reorganized, because it was deemed by Congress to be in the public interest to leave farmers in possession, and also preferably in ownership, of their lands, and not to have them foreclosed out through inability to meet mortgage obligations.

To this end the first Frazier-Lemke Act provided that a farmer in default on his mortgage could have resort to a court of bankruptcy, which would permit him to remain in possession of his lands. Then the farmer was to purchase the property at its appraised value, through deferred payments over a six-year period, if the mortgagee consented. If the consent were not forthcoming, foreclosure proceedings were stayed for five years, and the farmer remained in possession, paying a "reasonable rental" annually. At the end of five years, or at any time prior thereto, the farmer might pay into court the appraised value of the property in full discharge of the debt. From the mortgagee was taken his property right to have the mortgaged land put up for sale in foreclosure and to receive the price bid at the foreclosure sale or to bid in and retain the property himself if dissatisfied with the price bid on such sale.

That Act applied to vested property rights, that is, to mortgages already existing at the time of the enactment of the Act. In the *Radford* case, this Court held that Act unconstitutional on the ground that it took substantive property rights, which had already vested, from mortgagees. The Court said that while this might well be in the public interest, it was not permissible under the Fifth Amendment to do so without having a condemnation proceeding and paying just compensation to the mortgagee. In other words, the taking of the property rights from the mortgagee was a public taking, for a public economic or social purpose, and it was a violation of the Fifth Amendment to do so without a condemnation proceeding involving payment of compensation.

The public interest had been argued to the Court at length.* The Court said (Mr. Justice Brandeis), pp. 601-2):

> "We have no occasion to consider either the causes or the extent of farm tenancy; or whether its progressive increase would be arrested by the provisions of the Act. Nor need we consider the occupations of the beneficiaries of the legislation. These are matters for the consideration of Congress; and the extensive provision for the refinancing of farm mortgages which Congress has already made, shows that the gravity of the situation has been appreciated. The province of the Court is limited to deciding whether the Frazier-Lemke Act as applied has taken from the Bank without compensation, and given to Radford, rights in specific property which are of substantial value. * * * As we conclude that the Act as applied has done so, we must hold it void. For the Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual

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* The Court (Mr. Justice Brandeis) itself states that argument as follows (pp. 598-99):

> "(1) The welfare of the Nation demands that our farms be individually owned by those who operate them. (2) To permit widespread foreclosure of farm mortgages would result in transferring ownership, in large measure, to great corporations; would transform farmer-owners into tenants or farm laborers; and would tend to create a peasant class. (3) There was grave danger at the time of the passage of the Act, that foreclosure of farms would become widespread. The persistent decline in the prices of agricultural products, as compared with the prices of articles which farmers are obliged to purchase, had been accentuated by the long continued depression and had made it impossible for farmers to pay the charges accruing under existing mortgages. (4) Thus had arisen an emergency requiring congressional action. To avert the threatened calamity the Act presented an appropriate remedy. Extensive economic data, of which in large part we may take judicial notice, were submitted in support of these propositions."

mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public."

This Court unanimously reaffirmed these principles in its decision upholding the second Frazier-Lemke Act, which gave mortgagees their fundamental right to have the mortgaged property sold at public foreclosure sale and receive the price bid or, if dissatisfied with the bid at such a forced sale, buy the property in and retain it (*Wright* v. *Vinton Branch*, 300 U. S. 440 (1937)).

To the same effect as the *Radford* case is

Monongahela Navigation Co. v. *United States*, 148 U. S. 312 (1893).

The *Radford* case is emphatically in point here. The Frazier-Lemke Act was a reorganization statute. Section 11(b)(2) has been sought by the S. E. C. to be sustained as a reorganization statute.* The property taken in the *Radford* case was intangible property. Section 11(b)(2) likewise takes intangible property. Like the Frazier-Lemke Act, Section 11(b)(2) is allegedly founded on a public interest, in the case of Section 11(b)(2) the public interest in the form of the structure of public utility holding company systems, or of the corporations making up the systems. The Act here involved recites the national public interest, the interest of consumers, and the interest of investors, and even the interests of the states. It proceeds, as did the Act involved in the *Radford* case, without a condemnation proceeding and payment of compensation.

* That Section 11(b)(2) cannot be sustained as a "reorganization statute" is shown in Point I(c) below.

Are there any points of difference, so far as concerns the application of the Fifth Amendment, between the present case and the *Radford* case which would impel this Court to depart from its holding in the *Radford* case? If there are any differences, they call for the application of the Fifth Amendment in this case more strongly than in the *Radford* case. Insolvency is not required to be present (as it was in the case of the Frazier-Lemke Act) for the S. E. C. to proceed under Section 11(b)(2), and there are not present the safeguards of a right to notice and hearing provided in the Frazier-Lemke Act.*

It is not a distinction which obviates the application of the Fifth Amendement that in the present situation it is charged or found, by Congress or the S. E. C. or both, that prior to the enactment of the Act, public utility holding companies erected their systems by financing arrangements and methods now condemned by Congress or the S. E. C., but not at the time in violation of law.** Could it be successfully contended that the result in the *Radford* case would have been different, if the history of dealings in farm mortgages had shown an oppressive or unsocial, but not illegal, course of conduct by the holders of such mortgages up to the time the Radford mortgage was executed? The point is that the property rights legally existed in the systems at the time of the enactment of the Act. This, in itself, brings into play the requirements of the Fifth

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* The absence from the Act of a right to notice and a hearing for security holders in a Section II(b)(2) proceeding is another ground of unconstitutionality discussed in subdivision (b) of this Point I.

** If property is taken under Section 11(b)(2) because of past acts legal when done, then the Section is an unconstitutional *ex post facto* law as shown in Point IV (b) herein.

Amendment. As this Court said in the *Radford* case (p. 589):

> "Because the Act is retroactive in terms and as here applied purports to take away rights of the mortgagee in specific property, another provision of the Constitution is controlling.
>
> "*Fourth.* The bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment."*

All the arguments made by those supporting the validity of Section 11 under the Fifth Amendment are made in reliance on decisions of this Court upholding some form of regulation of future activities under the Fifth or Fourteenth Amendments. Such forms of regulation include fixing prices of goods sold, registration or licensing, requiring submission of proposed transactions for approval by administrative agencies, and even prohibiting specified future activities or making their performance illegal and a crime. In the latter category are the cases under the anti-trust laws where this Court has sustained prohibiting performance of certain acts and the dissolution of combinations put together in violation of existing law. We do not challenge such decisions, but they lend no support to Section 11(b)(2) under the Fifth Amendment, for they do not relate to a direct taking of property legally acquired. All the cases which have been cited by the Circuit Courts of Appeals and counsel for the S. E. C. to support Section 11(b)(2) are within these categories, as will appear.

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* *Cf.* concurring opinion of Mr. Justice Murphy in *Hirabayashi* v. *United States*, 320 U. S. 81, 110 (1943): "It has been frequently stated and recognized by this Court that the war power, like the other great substantive powers of government, is subject to the limitations of the Constitution."

The applicability of the *Radford* case is not overcome by anything advanced in the decisions of the Circuit Courts of Appeals in this or any other cases relating to Section 11.*

The Court below here did not, and could not, question the authority of the decision of this Court in the *Radford* case. Instead, it passed over that case saying only (R., Vol. IV, 896) that "It would indeed be a bit ironical" if the decision were held to be a bar to operations by the S. E. C. under Section 11(b)(2).

The Court repeated the argument of the Circuit Court of Appeals for the Second Circuit in *North American Co.* v. *Securities and Exchange Commission*, 133 F. 2d 148, 154 (C. C. A. 2, 1943) (involving a divestment of some subsidiary stocks under Section 11(b)(1)), to the effect that the taking of property involved, however "painful" to stockholders, is not so "capricious" as to constitute the taking of property without due process (R., Vol. IV, 897).**

This argument is fundamentally unsound on its face. Capriciousness cannot be the test of whether property may be taken for a public use without condemnation and compensation. The ordinary taking for a public use is deliberate and the opposite of capricious. When property is

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* There will be discussed in this Point I (a) only statements in the opinions in the Courts below herein and in the *North American* case being presented simultaneously herewith. The opinion in *Commonwealth & Southern Corporation* v. *Securities and Exchange Commission*, 134 F. 2d 747, 753 (C. C. A. 3, 1943), is obviously unsound on this point, for it states merely that the Fifth Amendment can have no application if, as the Court there finds, Section 11(b)(2) is an exercise of the commerce power. This is a direct contradiction of the undisputed principle enunciated by this Court in the *Radford* case and other cases, that all the powers of Congress are subject to the Fifth Amendment.

** Whether or not the taking of property involved in the *North American* case was "capricious", the taking of property involved in the dissolution of American is certainly "capricious", as shown in Point IV (g).

taken for a public highway or a railroad, this is not capriciously done. Property directly in the planned right of way is deliberately selected. The fact that the taking is said to be deliberate, and not capricious, does not mean that the property does not have to be paid for.

If these vested property rights stand in the way of the routes of interstate commerce, then in the exercise of its power over interstate commerce, the Federal Government may remove or take them just as it may remove or take buildings or land in the way of such routes, but the removal or taking must, under the Fifth Amendment, be through condemnation and payment of just compensation.

The Court below made further passing references on this point which do not seem to have great significance. The Court cited (R., Vol. IV, 896) *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 157-158 (1919), but the case has no bearing here. It constituted simply an unsuccessful challenge to the validity of a Federal statute, expressly passed under the war power to improve war production, suspending, after a reasonable period of time, the domestic sale of liquor for the balance of the duration of the first World War.

The Court below cited (R., Vol. IV, 896) two Federal statutes, which are not in any way analogous and which in any event have never been challenged and upheld as to constitutionality by the courts, and a decision also not in point.*

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* Paragraph 11 of Section 5 of the Interstate Commerce Act, as amended by the Emergency Transportation Act of 1933 (now paragraph 4, Section 5 of the Interstate Commerce Act) relates only to (a) effecting common ownership or control of more than one interstate carrier after passage of the Act without approval of the I. C. C., in violation of the Act, and (b) continuing control so effected illegally.

Section 19 of the Banking Act of 1933 simply relates to restrictions on a holding company voting shares of stock in a national bank

The Court also cited (R., Vol. IV, 896) *Block* v. *Hirsh*, 256 U. S. 135, 155-157 (1921). The holding in the case has no bearing here. It upholds the validity of a Federal statute expressly based on the war power, regulating rents in the District of Columbia for two years. However, the statement of this Court (Mr. Justice Holmes), at page 156, is illustrative of a point we are making here. There this Court said in substance that a taking of property could not be disguised as "regulation", citing another statement by this Court in *Martin* v. *District of Columbia*, 205 U. S. 135 (1907) at page 139, to the effect that while a reasonable zoning law limiting the height of *new* buildings might be valid as "regulation", nevertheless if, under the guise of "regulation", the height of new buildings were limited to say 5 feet, it would not be "regulation", but a taking of property requiring condemnation and compensation. *A fortiori*, a purported regulatory zoning law cutting down to zero the height of *existing* buildings would be such a taking. The section involved here is analogous to the latter.

Needless to say, the order of dissolution of American under Section 11 is not regulation. It does not *even purport to be regulation* of future activities for, as already indicated in the introduction to this Point, the regulatory provisions of the Act are entirely separate, being contained in Sections 6-10, 12, 13 and 15 of Title I and in Title II, and regulate every conceivable future activity of companies in a holding company system.

Even if, for the purpose of argument, we assume that these provisions of Section 11 purport to constitute regula-

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owned by it.

In *Lehigh Valley Railroad Company* v. *United States*, 243 U. S. 412 (1917), this Court refused to grant an injunction against an order of the Interstate Commerce Commission under Section 11 of the Panama Canal Act. No constitutional question was raised; the only question was a review of the judgment of the Commission as to whether the railroad company was in competition with a steamship company.

tion, such regulation would be of the type adverted to by this Court in *Block* v. *Hirsh* and *Martin* v. *District of Columbia*, just referred to, masking a taking of property, which requires condemnation and payment of compensation.

True regulation can only relate to future activities,* not to taking or destruction of static, existing property. Con-

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* Thus the statements made by this Court in *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591 (1944) regarding an incidental loss of value through regulation relate only to true regulation of future activities, i.e., the rates to be charged by a public utility. This also applies to the statements of this Court in *Bowles* v. *Willingham*, 321 U. S. 503 (1944), involving wartime rent control, and in *Yakus* v. *United States*, 321 U. S. 414 (1944) involving wartime meat price controls. In its opinion in the *Yakus* case, this Court in passing and in reference to the constitutionality of the use by the Federal Government of its wartime powers mentioned *Miller* v. *Schoene*, 276 U. S. 272 (1928). That case rested squarely on the principle of the constitutionality of prevention or destruction of a *tangible nuisance or pest*, as shown by the authorities cited in the Court's opinion in *Miller* v. *Schoene*, as sustaining the decision. The case itself upheld the constitutionality of the destruction of cedar trees which were the host of an infectious plant disease, and the decision of the Court rested expressly on the authority of the tangible nuisance cases, viz:

Hadacheck v. *Los Angeles*, 239 U. S. 394 (1915) prohibiting manufacture of bricks in certain city districts;

Village of Euclid v. *Ambler Realty Co.*, 272 U. S. 365 (1926), where an ordinary zoning ordinance as to types of buildings in districts was upheld against a complaint by an owner of unimproved land;

Fertilizing Co. v. *Hyde Park*, 97 U. S. 659 (1878) upholding a municipal ordinance forbidding making of fertilizer from offal in a city area;

Northwestern Laundry v. *City of Des Moines*, 239 U. S. 486 (1916), upholding a city ordinance against generating a smoke nuisance.

Sligh v. *Kirkwood*, 237 U. S. 52 (1915), upholding a Florida state law against shipment of green and inedible citrus fruit;

Reinman v. *Little Rock*, 237 U. S. 171 (1915), upholding a municipal ordinance against conducting a livery stable in certain city districts.

Whatever the application of the doctrine of *Miller* v. *Schoene* and like *tangible nuisance or pest cases* may be to the constitutionality of the exercise of wartime powers involved in the *Yakus* case, the doctrine has no application to the sort of intangible property involved

sequently, the implication in the opinion of the Court below (along with that Court's citation (R., Vol. IV, 897) of *Nebbia* v. *New York*, 291 U. S. 502, 527 (1934)) that the taking resulting from the application of Section 11(b)(2) here may be only a business loss incidental to "regulation", is wholly untenable.*

This distinction regarding the taking or destruction of property here involved as contrasted with regulation of future activities, can be simply put, so that no circuitous form of words can cloud it. Insuring against future acts of an individual *by executing a death sentence on that individual*, and taking away all his property, is not "regulation" of that individual. Similarly, it is not "regulation" to insure against performance of future acts of a corporation *by executing a death sentence on the corporation* and taking away all its property.

The applicability of the *Radford* case is not overcome by what has been approved by this Court in the cases under the anti-trust laws. The Court below cited (R., Vol. IV, 894, 896) a case under the anti-trust laws as if such cases sustained the taking involved here, *Northern Securities Co.* v. *U. S.*, 193 U. S. 197 (1904). In that case stocks of two competing railroad companies had been placed in a holding

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in the present case, which cannot constitute a tangible nuisance or pest. The property involved here, i. e., stocks and bonds, assemblage and going-concern value, organizing and financing cost, cannot be in itself noxious or a pest. If there is any evil in the situation it can only be due to the identity of the owner or owners. Consequently, an effort to affect the ownership must inevitably constitute a taking of property from the present owner by transferring it to a new owner or destroying it. Under no concept can such taking be deemed the abatement of a tangible nuisance or pest.

* The decision in *Nebbia* v. *New York* simply represents the final rejection by this Court of the proposition that only businesses "affected with a public interest" can be regulated by a legislature under the police power. The case involved nothing but true regulation of future activities, that is, sales prices of milk, by the New York Legislature.

company in direct violation of existing anti-trust laws, and the combination was put asunder. Such a case is no precedent here where no law has been violated, or statutory prohibition transgressed.*

The Court below also cited (R., Vol. IV, 896) another case where property was destroyed as a penalty for operation in violation of existing law, *Mugler* v. *Kansas*, 123 U. S. 623, 668-670 (1887). There a brewery was operated in violation of existing state law and its destruction as a penalty was upheld. Such cases also have no application to the present situation, where no law has been violated.**

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* Other cases under the anti-trust laws which have been cited by counsel for the S. E. C. are also not in point:

United States v. *Reading Co.*, 253 U. S. 26 (1920), *Continental Insurance Co.* v. *United States*, 259 U. S. 156 (1922) (further proceedings in same case), *Standard Oil Company* v. *United States*, 221 U. S. 1 (1911) and *United States* v. *American Tobacco Company*, 221 U. S. 106 (1911) are cases entirely similar to *Northern Securities Co.* v. *U. S.*, where properties had been put together in violation of anti-trust laws and were ordered put asunder. This Court recently recognized that the *Reading* and *Continental* cases, representing penalties for willful violations of existing anti-trust laws, were not precedents under the Public Utility Holding Company Act, *Otis & Co.* v. *Securities and Exchange Commission*, 323 U. S. 624, 639 (1945).

United States v. *Delaware, Lackawanna and Western Railroad Company*, 238 U. S. 516 (1915), *United States* v. *Lehigh Valley R. R. Co.*, 220 U. S. 257 (1911) and *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366 (1909), involved the commodity clause of the Hepburn Act, which forbade the handling in interstate commerce by a carrier of coal owned or controlled by that carrier. While, as a result it might turn out to be more profitable for a carrier voluntarily to divest itself of the coal mines, so that it could transport the coal therein when owned by another, rather than to retain the mines and not haul the coal, the statute did not require divestment, but only regulated future acts and made them illegal.

** Counsel for the S. E. C. have frequently cited other cases sustaining regulation of future activities which are, for that reason, not in point here:

Austin v. *Tennessee*, 179 U. S. 343 (1900) where a state prohibited the sale of cigarettes, and the cigarettes involved came into the state after the law was passed;

Lawton v. *Steele*, 152 U. S. 133 (1894) where it was held that fish nets set out in violation of existing state law might be seized and destroyed as a penalty;

In the portion of the decision in the *North American* case quoted by the Court below here (R., Vol. IV, 897), there is an implication that compelling a corporation to dispose of property through sale or distribution to stockholders may not be a taking, because there may be no loss. The observation is not only inapplicable to a large portion of the property taken in the present case, but is in itself unsound. In the *North American* case it was ordered only that the holding company divest itself of the common stocks of some of its subsidiaries. In the present case the order results in (a) a divestment by the holding company of all of its subsidiary stocks, and (b) taking away from the security holders of American the securities they hold which were issued by American, and taking from American and destroying the millions of dollars of property represented by the organization and financing expenses inhering in the existing setup of the holding company. We have also mentioned the value inhering in American from its ability to effect savings in dividend paying and stock transfer costs, and from its being a medium for diversified investment. The observation of the Court in the *North American* case is applicable only to

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Booth v. *Illinois*, 184 U. S. 425 (1902) and *Otis* v. *Parker*, 187 U. S. 606 (1903) where states prohibited the making in the future of certain types of contracts;

Rast v. *Van Deman & Lewis Co.*, 240 U. S. 342 (1916), involved the imposition by a state of a license tax on merchants thereafter using profit sharing coupons in their selling activities;

Wickard v. *Filburn*, 317 U. S. 111 (1942), involved regulation of the sale and use of commodities;

United States v. *Darby*, 312 U. S. 100 (1941), involved regulation of wages paid to employees producing goods;

National Labor Relations Board v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 43 (1937), involved regulation of labor relations of employers producing goods;

Chicago Board of Trade v. *Olsen*, 262 U. S. 1, 40 (1923), involved regulation of future transactions in grain on an exchange;

Stafford v. *Wallace*, 258 U. S. 495 (1922), involved regulation of future transactions relating to stockyards;

Louisville & Nashville Railroad Co. v. *Mottley*, 219 U. S. 467

a portion of the taking mentioned in (a) above. It can have no application to the taking mentioned in (b) above where there is no possibility of any salvage.

Even as to the taking mentioned in (a) above, that is, the divestment by the holding company of subsidiary stocks by forced sale, proceeds of forced sales cannot be the equivalent of the just compensation required by the Fifth Amendment.

If this kind of taking is permitted under Section 11 under the guise of "regulation", then the Federal Government when interstate commerce is affected, or any state government, may decree that an existing corporation, which was not set up in violation of any law (whether it be an agricultural corporation or a railroad corporation or a church or a university),* or an individual, is deemed to have

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(1911) and *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290 (1897), where certain future acts were prohibited and it was held that the performance of such acts under existing executory contracts could be prohibited since obviously one cannot by contract made before enactment of a statute legalize performance after passage of the statute of acts validly prohibited thereby.

The *Gold Clause* cases referred to by this Court in another connection in a recent case involving the Act, *Otis & Co.* v. *Securities and Exchange Commission*, 323 U. S. 624 (1945) are similar to the two last cited cases, and are also not in point here. In the *Gold Clause* cases (*Norman* v. *Baltimore & Ohio Railroad Co.*, 294 U. S. 240 (1935)), executory contracts provided for future performance of acts, that is, the delivery of a specified weight of gold in lieu of such United States currency as might be declared legal tender by Congress. The performance of such acts, being made illegal by Congress in the exercise of its power over the currency, could not be legalized simply by pre-existing executory contracts. The Joint Resolution there involved was upheld as not violating the Fifth Amendment on the express ground that it affected executory contracts, 294 U. S. at pp. 306-311. We have here vested property rights in the ownership of stocks and bonds, in the organization and financing costs of American, and its value as a going-concern, not in any respect executory contract rights.

* Any protection against true *regulation* heretofore deemed to be afforded property or businesses or institutions not "affected with a public interest" was finally dissipated by the decision of this Court in *Nebbia* v. *New York*, 291 U. S. 502, 536 (1934), *supra*.

too much property and must sell all or most of it within a year to those who may wish to buy it. The Fifth Amendment must be a protection against such a taking of property. If Government is to require owners to part with their property for a public purpose, then, under the Constitution, Government must condemn the property and pay just compensation.

(b) The taking of property of security holders without giving them the right to notice and a hearing.

It is fundamental that it is a violation of the due process clause of the Fifth (or Fourteenth) Amendment for a government to take property without giving the owner thereof the right to notice and a hearing.

There is no provision in Section 11(b)(2), or elsewhere in the Act, giving the holders of the securities of American, whose securities issued by American are taken from them by an order entered under Section 11(b)(2), the right to notice and a hearing. There is a provision in Section 19 of the Act *permitting* the S. E. C. to grant security holders a hearing before the S. E. C.* There is no provision whatever in the Act regarding a hearing for security holders before a Federal court.

This Court has held that extra-official notice of a hearing, or a hearing granted as a matter of favor, is not a substitute for the right to a hearing required by the due process clause. In *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 424-5 (1915) in condemning the absence of a statutory requirement of a hearing for stockholders, this Court said:

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* The word "may" in this section cannot be construed as mandatory because, in the same sentence, it is provided that the S. E. C. *shall* admit as a party any interested state, state commission or political subdivision of a state.

> "Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires. • • • 'It is not enough that the ...rs may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard.' The soundness of this doctrine has repeatedly been recognized by this court."

Similarly, it has been held by this Court that actual notice given as a matter of discretion does not meet the due process requirement that notice be mandatory under the statute. *Wuchter v. Pizzutti,* 276 U. S. 13, 24 (1928).

On this point, the Court below merely called attention (R., Vol. IV, 898) to the fact that the S. E. C. published notice and an invitation to be heard in the Federal Register, which does not meet the rulings of this Court just cited, and then quoted a passage from the decision of the Circuit Court of Appeals for the Third Circuit in *Commonwealth & Southern Corporation* v. *Securities and Exchange Commission,* 134 F. 2d 747, 753 (C. C. A. 3, 1943), involving involuntary reclassification of stock under Section 11(b)(2). The statement of that court is to the effect that a complaint about stockholders not having a right to be heard is premature in a Section 11(b)(2) proceeding before the S.E.C., and that stockholders would have an opportunity to assert any objections, including lack of due process, in the District Court in subsequent proceedings relating to the carrying out of the S. E. C. order. This observation of the Circuit Court of Appeals for the Third Circuit, cited with approval by the Court below here, is unsound because the S. E. C. has contended, and the courts have held, that, at a later stage of such a proceeding, such an objection is too late.

For example, in *New York Trust Co.* v. *Securities and Exchange Commission,* 131 F. 2d 274 (C. C. A. 2, 1942), cert. den. 318 U. S. 786 (1943), rehearing denied 319 U. S. 781 (1943), the S. E. C. contended, and the court held, that in a later stage of a Section 11(b)(2) proceeding before the S. E. C. itself, where security holders had been permitted by the S. E. C. to appear pursuant to Section 19 of the Act, it was too late for them to question the prior entry in the same proceeding, when the security holders had not been parties, of a *dissolution order* of the corporation there involved which had not been contested by the corporation. The S. E. C. seems to contend in these cases that it is either too early or too late to raise such objections regarding its orders, or that the wrong party raises them.

Compare also the recent position taken by the S. E. C., and upheld by the Circuit Court of Appeals for the First Circuit, that American, as 100% stockholder of one of its subsidiary public utility operating companies, was not a "person aggrieved," with a right of court review of an accounting order issued against the subsidiary company but affecting only American from a monetary standpoint, a contention rejected by this Court in *American Power & Light Company* v. *Securities and Exchange Commission,* 65 S. Ct. 1254 (June 4, 1945).

In connection with this absence of a right to notice and a hearing, it must be borne in mind that the property of the security holders of American is directly taken, i. e., their stock and debentures issued by American, apart from the vital indirect interest which such security holders have in the taking and destruction of American's own property.

Moreover, the determination of the S. E. C. that American must be destroyed and the property of its security

holders in American taken away, was based on some sort of evaluation by the S. E. C. of the relative interests of the public holders of various classes of securities issued by American—debentures, preferred stocks and common stock, and the relation of such values to the values of the various holdings of securities in American by Bond and Share, and the values of the various security issues of the subsidiaries of American.

It seems fundamental that in order to comply with the due process clause, the persons directly affected must be given an opportunity at a hearing to examine and rebut the evidence introduced by the Commission on such an issue,—a right not accorded by this Act.

(c) Section 11(b)(2) cannot be upheld as a reorganization statute.

We desire here simply to refute a basis upon which the S. E. C. has on occasion sought to sustain Section 11, that is, as a "reorganization statute." There are two principal reasons why the section cannot be sustained on that basis.

(1) Compulsory involuntary reorganization, where no illegal act has been committed, can only take place through the exercise of the bankruptcy power.* No other source of power for such a reorganization is to be found in the Constitution.

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* So-called reorganizations in equity are simply foreclosures under the exercise of a mortgagee's contractual power to compel the sale of the mortgaged assets or are in the nature of execution sales to satisfy creditors' claims. The creditor then takes his share of the price or has the option of taking securities in a new corporation, which acquires the assets of the old. Even this type of reorganization is not effected unless the debtor company is in financial distress.

The exercise of the bankruptcy power in such a case is dependent on the *insolvency,* in either the bankruptcy or equity sense, of the subject.

> *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648 (1935);
> *Wright* v. *Union Central Life Insurance Co.*, 304 U. S. 502 (1938).

In the *Continental Illinois* case this Court said as to the bankruptcy power (p. 670):

> "Judge Cowen, in *Kunzler* v. *Kohaus,* 5 Hill 317, 321, a decision which was approved by this court in *Hanover National Bank* v. *Moyses* [186 U. S. 181], *supra,* said that the power was the same as though Congress had been authorized 'to establish uniform laws on the subject of any person's general inability to pay his debts * * *' ".

In the *Wright* case this Court said (pp. 513-514):

> "The subject of bankruptcies is nothing less than 'the subject of the relations between an insolvent or nonpaying or fraudulent debtor and his creditors, extending to his and their relief.' This definition of Judge Blatchford, afterwards a member of this Court, has been cited with approval here."

(2) The Section cannot be sustained as a reorganization statute because it does not contain the two minimum safeguards which every bankruptcy act must contain in order to comply with the due process clause. The two fundamental safeguards are a provision giving security holders the right to notice and a hearing, and a provision for vote or consent of security holders.

The absence of the first safeguard is discussed in Point I(b) above.

As to the lack of a provision for vote or consent of security holders, this Court said in the *Radford* case that the substantive rights of the mortgagee could not be adversely affected without the mortgagee's consent, or without the consent of the class to which the mortgagee belonged and the approval of a court, viz., 295 U. S. 585-6:

> "Nor do the provisions of the bankruptcy acts concerning compositions afford any analogy to the provisions of Paragraph 7. So far as concerns the debtor, the composition is an agreement with the creditors in lieu of a distribution of the property in bankruptcy—an agreement which 'originates in a voluntary offer by the bankrupt, and results in the main, from voluntary acceptance by his creditors.' * * * In no case of composition is a secured claim affected except when the holder is a member of a class; and then only when the composition is desired by the requisite majority and is approved by the court."

II. Section 11(b)(2) does not rest, or purport to rest, on the Federal power over interstate commerce, or any other Federal power, and is therefore unconstitutional.

No issue is raised here, such as has been the subject of much recent litigation, of the extent of the concept of interstate commerce as a proper subject of Federal legislation. Recent decisions extending the concept of interstate commerce are not challenged. Nor is any issue raised here as to the Federal Government's right to impinge on matters heretofore left to the states, when a Federal power is being exercised.

The point at issue is that Section 11(b)(2) on its face does not purport to be an exercise of any Federal power, such as the power over interstate commerce, and the dissolution order against American is not based on even a purported jurisdictional finding by the S. E. C. that interstate commerce is affected, beneficially or otherwise. There is no claim that the Section is based on any other Federal power.

Section 11(b)(2) is made applicable by its terms to American, as the Court below stated (R., Vol. IV, 891), only because (a) American is by statutory definition a subsidiary company* of a registered holding company (Bond and Share), and (b) American is itself a registered holding company. Bond and Share and American registered under Section 5 of the Act for the reason that they incidentally used instrumentalities of interstate commerce from which, without registration, they would have been excluded by Section 4(a) of the Act. The requirement of registration by reason of such incidental use of such instrumentalities was upheld by this Court on the ground that such use entitled Congress to obtain data regarding the companies in the Bond and Share System for the purpose of future legislation. As previously stated, upon the urging of counsel for the Securities and Exchange Commission, this Court held that (a) the registration provisions were separable from (b) the regulatory provisions and (c) the disintegration and reorganization provisions of the Act, and that its decision upholding the registration provisions did not determine the validity of other por-

* Since Bond and Share holds more than 10% of the voting shares of American (Section 2(a) 7-9). Bond and Share has 20.7% of the voting shares, representing 4½% of book value of such shares.

tions of the Act. *Electric Bond and Share Company* v. *Securities and Exchange Commission*, 303 U. S. 419 (1938).*

The Court below conceded (R., Vol. IV, 891) that Section 11(b)(2) "contains no reference to interstate commerce."

The Section does not provide that the S. E. C. is to operate thereunder on any company or system by reason of that company or system being in interstate commerce, or on the ground that any "unfair or inequitable distribution of voting power" or "undue or unnecessary complication of structure" (the controlling phrases in the Section) in that company or system affects commerce, beneficially or otherwise. No finding to that effect by the S. E. C. is provided for in the Act and no such finding by the S. E. C. was made in this case. Nor is such a finding made by the S. E. C. in other cases under Section 11.

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* The basis on which the draftsmen obviously hoped originally that so unlimited a statute might be sustained was that registration (which subjects companies to Section 11(b)(2) by statutory definition), although compelled as a practical matter by the devices in the Act, would be regarded by the Courts as at least *theoretically optional* (the option being to go out of business) so that the Courts would accept registration as submission and not review the compulsion exerted. However, after passage of the Act and before the *Electric Bond and Share* case was decided by this Court, this theory was abandoned by the S. E. C. and the Government attorneys representing it, for the reason that they wished to argue that the registration provisions were separable from the remainder of the Act and sustainable on the narrow grounds heretofore stated. (It seems to us that this position could only have been adopted because of recognition of the vulnerability of Section 11 to attack in respect of its constitutionality.) In the *Electric Bond and Share* case this Court held that registration was not *voluntary*.

While the argument has been made by the S. E. C., we think that it will no longer be seriously contended that the definitions in Section 2 of the Act, as to what companies must register under the Act and thereby become subject to Section 11, in any way limit the application of Section 11 to matters affecting interstate commerce. This matter is discussed in the brief of *amici curiae* in the *North American* case, pp. 17-19.

The Court below sought to support the dissolution order issued under Section 11(b)(2) here as an exercise of the interstate commerce power on three propositions, which will be dealt with in order.

(a) The S. E. C.'s argument based on the alleged exemption in Section 3(a).

In the *North American* case in the Circuit Court of Appeals for the Second Circuit, the S. E. C. came forward for the first time with the proposition that Section 3(a) of the Act contained a provision whereby a company could, on application to the S. E. C., obtain exemption from the Act as a whole if it were not in or affecting interstate commerce, that the company there involved had not applied for and been granted such an exemption, and that this resulted in limiting application of Section 11 of the Act to a company in or affecting interstate commerce. The same proposition was put forward by the S. E. C. as to American in the present case in the Court below, and was adopted by the Court.

But the proposition, based on Section 3(a), is on the face of that Section untenable.* The test of exemption

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* "Sec. 3. (a) The Commission, by rules and regulations upon its own motion, or by order upon application, shall exempt any holding company, and every subsidiary company thereof as such, from any provision or provisions of this title, unless and except insofar as it finds the exemption detrimental to the public interest or the interest of investors or consumers, if—

"(1) such holding company, and every subsidiary company thereof which is a public-utility company from which such holding company derives, directly or indirectly, any material part of its income, are predominantly intrastate in character and carry on their business substantially in a single State in which such holding company and every such subsidiary company thereof are organized;

"(2) such holding company is predominantly a public-utility company whose operations as such do not extend beyond the State in which it is organized and States contiguous thereto;"

(There are three additional subdivisions to Section 3(a), but the S. E. C. does not claim that these three other subdivisions have any bearing.)

under Section 3(a) does not relate to interstate commerce and does not depend on a company being in or affecting interstate commerce. As conceded by the Court below, the introductory clauses of subsection (a) contain a condition precedent to exemption under any of the following subsections, which condition does not depend on a company not being in interstate commerce or affecting interstate commerce. Even if the test of the following subsections can be met by a company, exemption is still to be denied by the S. E. C. under the introductory clause "insofar as it finds the exemption detrimental to the public interest or the interest of investors or consumers."

As to this difficulty on the face of the exemption provision, the S. E. C. urged that it had "ruled" that the quoted clause would not be used to deny exemption, unless the exemption would be detrimental to the interests of the public or of investors or consumers by reason of activities of the applicant in interstate commerce or affecting interstate commerce. The Court said (R., Vol. IV, 892-893) "This interpretation by the Commission is entitled to great weight and should be accepted by the courts."

This is not the sort of statutory interpretation in which the courts yield to an administrative body. There is no ambiguity in the statutory provision and no language whatsoever upon which this interpretation by the S. E. C. could be based. It relates to a clear cut question of law and governs constitutional rights. *Dobson* v. *Commissioner,* 320 U. S. 489, 502 (1943); *Bingham's Trust* v. *Commissioner of Internal Revenue,* 65 S. Ct. 1232 (June 4, 1945).

The language of this exemption provision would certainly not lead any one to believe that a company could obtain exemption thereunder solely on a showing of not being engaged in or affecting interstate commerce.

The reason for this circuitous reliance on this exemption provision in Section 3(a) of the Act is not apparent.

The S. E. C. might just as well have asserted that it construes the pivotal Section 11(b)(2) itself as being applicable only to companies in or affecting interstate commerce or only if the "unfair or inequitable distribution of voting power" or "undue or unnecessary complication of structure" affects interstate commerce, and that it operates on a company under Section 11(b)(2) only if the operation will affect interstate commerce.

Yet, the S. E. C. strenuously resists being forced to any such interpretation of the pivotal Section.

Whether or not this proposition of the S. E. C. and the Court below relating to the S. E. C.'s interpretation of the "insofar" clause in the introductory provision to subdivisions (1) and (2) of paragraph (a) of Section 3 is correct, it does not go far enough to carry their argument. To obtain exemption, a company must not only qualify under the "insofar" clause, but also meet the succeeding test in subdivision (1) or subdivision (2). The difficulty from the standpoint of the S. E. C.'s argument is that a company cannot qualify under either such subdivision merely by reason of not being in or affecting interstate commerce. Under subdivision (1) a holding company which is seeking exemption, and every public utility subsidiary company thereof from which it gets income, must carry on business "substantially in a single State in which such holding company and every such subsidiary company thereof are organized." So far as we know, it has not heretofore been urged successfully that a company is in or affects interstate commerce by reason of the fact that some other company in which it holds securities is incorporated in another state.

Subdivision (2) need not be discussed, for it is simply not available to an ordinary holding company, but only to a holding company which is predominantly a public utility operating company.

Consequently, even should this Court follow the Court below in accepting the S. E. C.'s interpretation of the "insofar" clause of the introduction to Section 3(a), the exemption of Section 3(a) is still not available by reason of a company not being in or affecting interstate commerce in view of the conditions of subdivisions (1) and (2).

(b) The S. E. C.'s argument based on the findings contained in Section 1.

The Court below also accepted a proposition first put forward by the S. E. C. in the Circuit Court of Appeals for the Third Circuit, and adopted by that Court, in *Commonwealth & Southern Corporation* v. *Securities and Exchange Commission*, 134 F. 2d 747, 753 (C. C. A. 3, (1943), a case argued prior to the *North American* case.* This proposition is that Congress allegedly found in Section 1 of the Act that "unfair or inequitable distribution of voting power" and "undue or unnecessary complication of structure" in holding company systems *often* affect interstate commerce, and that such distribution of voting power and complication can therefore be remedied in *all* cases, irrespective of whether they have any effect on interstate commerce, and irrespective of whether the operation performed as a remedy affects interstate commerce, beneficially or otherwise.

The Court below here also held (R., Vol. IV, 893-894) that, in view of this assumed finding by Congress in Section 1 of the Act, it was not necessary for the S. E. C. itself to find that the alleged "unfair or inequitable distribution of voting power", or "undue or unnecessary complication of structure" in this case, or the dissolution of American,

* The S. E. C. had not invented the Section 3(a) exemption proposition at the time of the argument of the *Commonwealth & Southern* case.

had or would have any effect on interstate commerce. The Court below then cited (R., Vol. IV, 894), in support of the proposition, four cases decided by this Court.

There are two conclusive objections to the proposition. (1) Section 1 of the Act does not contain findings by Congress to the effect claimed by the Court below. (2) The decisions of this Court cited in support of the proposition are clearly not in point; and the proposition, if sustained, would destroy any limitation on the Federal Government requiring it to legislate only in the exercise of its delegated constitutional powers, such as its power over interstate commerce.

(1) Obviously, to sustain even the basic premise for this proposition of the Court below, there must be discovered in Section 1 of the Act a finding by Congress that the "unfair or inequitable distribution of voting power" and the "undue or unnecessary complication of structure" of holding company systems "often" affect interstate commerce. But a reading of Section 1 makes it plain that there is no such finding contained therein. In fact, it is apparent that Section 1 does not contain any finding by Congress intended to support Section 11 of the Act, but only findings intended to support the regulatory and registration portions of the Act in Title I and Title II, and possibly the Natural Gas Act. The following resume of the clauses in Section 1 demonstrates the correctness of our assertion:

> Clause (1) of subdivision (a) of Section 1 contains findings only that securities of companies in public utility holding company systems are widely marketed through use of instrumentalities of interstate commerce, a matter regulated in Sections (6) and (7) of Title I of the Act.

In clause 2 of subdivision (a) there is a finding that servicing arrangements are "often"* made or performed by use of instrumentalities of interstate commerce, a matter regulated by Sections 12 and 13 of Title I.

Clause 3 of subdivision (a) contains a finding that electric energy and gas are often transported by use of instrumentalities of interstate commerce, a matter regulated (as to electricity) by the Federal Power Commission under Title II of the Act and (as to gas) under the Natural Gas Act.

In clause 4 of subdivision (a) there is a finding that the practices of public utility holding companies and their subsidiary companies in respect of and control over subsidiary companies often materially affect the interstate commerce in which those companies engage, a matter regulated by Title I of the Act and by the Federal Power Commission under Title II of the Act.

Clause 5 of subdivision (a) contains a finding that the activities of public utility holding companies and their subsidiaries in many states make effective state regulation difficult.

Subdivision (b) of Section 1 contains no reference whatsoever to interstate commerce. It relates only to activities which are stated to be adverse to the interests of various classes of the public, if not regulated, and which are regulated under the Act

* We should mention that the legislative history of the Act demonstrates that the word "often" was deliberately chosen by Congress and that Congress rejected the proposal that it make a broader statement. When the original bills were introduced, clauses 2, 3 and 4 of what is now Section 1(a) did not contain the word "often". For example, what is now clause 2 read: "Their [public utility holding companies] service, sales, construction, and other contracts and arrangements are made and performed by means of the mails and instrumentalities of interstate commerce." However, the Act as passed months later interpolated the word "often" in these clauses, thus rejecting the findings proposed by the sponsors of the original bills.

by the regulatory provisions of Title I or under Title II.

Subdivision (c) of Section 1 is in three parts, divided by semi-colons. The first part is a finding, and the second and third parts are declarations of policy. There is no finding whatsoever in the second and third portions of subdivision (c). The finding in the first portion is only a repetition that due to the abuses enumerated in subdivision (b) "the holding company", if unregulated, is injurious to the public. Moreover, obviously, the finding is made in order to support regulation of the activities previously enumerated, a function performed by the regulatory provisions of Title I of the Act and Title II of the Act. (Since there are no findings in the other two portions of subdivision (c), they have no bearing on the point here discussed.*)

It is therefore plain that there is no basis for the premise of the Court below that Congress made a finding in

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* Attention may be called to the portion of the statement of policy of Congress contained in the second clause of subdivision (c) that the Act is to be interpreted "to meet the problems * * * enumerated in this section, connected with public-utility holding companies *which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce.*" If it has any bearing here, the clause can only express the intent of Congress that application of the Act be directed and limited to matters which are found by the S. E. C. to affect interstate commerce and which are therefore a proper subject of the exercise of Federal power. The S. E. C. has consistently construed the Act as not requiring any such finding in connection with the application of Section 11, and there is no such finding in this case. For example, in its brief in *North American Co.* v. *Securities and Exchange Commission*, 133 F. 2d 148 (C. C. A. 2, 1943), the S. E. C. argued that a condition in Section 1(c) of the Act did not limit operation by the S. E. C. under Section 11(b)(1) and in that connection stated (p. 26):

> "We think it perfectly clear that Section 1(c) imposes no such conditions. Section 1 states the policy and objective of Congress, but itself is not regulatory. The provisions for the application of these standards are supplied elsewhere in the Act. The provision presently relevant is Section 11(b)(1). That section requires divestment of properties unless they are affirmatively shown to meet specific conditions."

Section 1 of the Act to the effect that "unfair or inequitable distribution of voting power" or "undue or unnecessary complication of structure" of a public utility holding company system even "often" affect interstate commerce.

(2) Assuming, however, for the purpose of argument, that the findings in Section 1 of the Act amount to a finding that "unfair or inequitable distribution of voting power" or "undue or unnecessary complication of structure" of public utility holding company systems "often" affect interstate commerce, such a finding could not, under the decisions of this Court, cited by the Court below, support the indiscriminate application of Section 11(b)(2) whether or not there is found to be any effect on interstate commerce.

The Court below relied on *Stafford* v. *Wallace*, 258 U. S. 495, 520-521 (1922) and *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, 40 (1923). In the *Stafford* case this Court upheld a Federal statute authorizing regulation of future activities and transactions relating to a stockyard, and in the *Chicago Board of Trade* case a Federal statute authorizing regulation of future transactions in grain on an exchange known as the Chicago Board of Trade. This is a species of regulation of future activity by use of instrumentalities of commerce and the mails entirely analogous to the regulation of future activities by the regulatory portions of the Act not here involved. There is no analogy to the present application of Section 11(b)(2). The stockyards and exchange were not abolished or their property ordered sold or destroyed.

It was pointed out in those cases that while the overwhelming portion of the transactions in the stockyards and on the exchange were through use of instrumentalities of commerce or the mails or in interstate commerce, there

might be some transactions purely intrastate which would come under regulation. There it was contended that this invalidated the statutes involved. This Court held, however, that there was such an intermingling of transactions that separation of the purely intrastate transactions was impracticable, and that regulation of all transactions was, therefore, an "appropriate means" of regulating the overwhelming majority of interstate transactions.

Such justification of the application of those statutes, merely regulating future activities as an "appropriate means" under the circumstances of regulating a mass of future interstate transactions intermingled with intrastate transactions, may have application to the similar regulatory provisions of the Public Utility Holding Company Act, but can have no application to Section 11(b)(2).

Here it is obviously practicable for the Federal administrative agency to consider and find whether the attributes mentioned in the two controlling phrases in the first sentence of Section 11(b)(2) of the static ownership of property rights substantially affect interstate commerce in any particular case, and whether the remedy to be applied substantially affects interstate commerce in a particular case. Here also it is demonstrated by Congressional enactment that there are other "appropriate means" for regulating future transactions affecting interstate commerce whether or not mingled with purely intrastate transactions,—the regulatory provisions of the Act.

Moreover, the means employed here must be considered to see if they can be deemed "appropriate". The execution of a "death sentence" on property rights without regard to any effect on interstate commerce, under Section 11(b)(2) as construed by the S. E. C., to ensure that there will be no future activities of any kind, as contrasted with reg-

ulation of such activities, cannot be an "appropriate means" of exercising the power over interstate commerce.*

The two other cases** cited by the Court below in this connection have no application. They represent refusals by this Court to upset findings by the National Labor Relations Board that activities of the subject companies had a substantial effect on interstate commerce, as a basis for exercising jurisdiction over their labor relations.

Nor is the present case analogous to cases in which this Court has upheld the regulation by Congress through an administrative agency, e.g., the Interstate Commerce Commission, of activities admittedly purely intrastate which are found to have a substantial effect on interstate commerce.***

This Court has recently held that, when Federal power is exercised within what would normally be the domain of state power, the justification must appear affirmatively and not rest on inference, *Yonkers* v. *United States*, 320 U. S. 685 (1944). In the present case matters of corporate

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* While this Court has held the making of insurance contracts to be interstate commerce sufficient to subject the insurance companies to the Federal power over interstate commerce (two Justices holding that only the activities of insurance companies in interstate commerce were subject to regulation under the Federal power) *United States* v. *South-Eastern Underwriters Association*, 322 U. S. 533 (1944), we do not believe that any of the Justices would hold that the ownership of the property involved here is commerce of any sort. Nor is the present case in any way analogous to *Polish Alliance* v. *Labor Board*, 322 U. S. 643 (1944) where this Court refused to upset a finding by the Labor Board that the business activities of a company did have a substantial effect on interstate commerce, as a basis of jurisdiction over its labor relations. There is no such finding by the S. E. C. in the present case as a basis of its exercise of jurisdiction.

** *National Labor Relations Board* v. *Jones & Laughlin*, 301 U. S. 1, 43 (1937); *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 221-222 (1938).

*** The *Shreveport* cases, 234 U. S. 342 (1914).

structure, voting power and the dissolution of state corporations would certainly seem to be matters ordinarily within the domain of state power, and justification of the exercise of Federal power certainly does not appear affirmatively, either from the statute itself or from the Findings and Opinion of the S. E. C.

The presence of a substantial effect on a subject matter of Federal power is a prerequisite to constitutionality. Expressed another way, Federal legislation must at least be directed to an exercise of a Federal power to be constitutional.

(c) The S. E. C.'s argument based on the separability clause in Section 32.

In passing, the Court below, as a third proposition, sought (R., Vol. IV, 893), to sustain Section 11(b)(2) as applied to American here on the basis of Section 32 of the Act—the so-called separability provision, which provides:

> "Sec. 32. If any provision of this title or the application of such provision to any person or circumstances shall be held invalid, the remainder of the title and the application of such provision to persons or circumstances other than those as to which it is held invalid shall not be affected thereby."

If any help is derived from this section, it can only be to limit the application of the Act to situations affecting interstate commerce and require jurisdictional findings regarding the effect on commerce by the administrative agency, the S. E. C. Of course, there are no jurisdictional findings here, and the S. E. C. has never construed Section 11 as being limited to situations affecting commerce so as to require such findings.

However, such a separability clause will not sustain a statute as an exercise of the commerce power in the absence

from the statute of other substantive provisions indicating that the statute is intended to be limited to situations affecting interstate commerce. In *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1 (1937), this Court upheld the National Labor Relations Act, containing a similar separability clause, as an exercise of the Federal power over interstate commerce, on the sole ground that, by reason of other substantive provisions, that Act could be construed as limited in its application to situations "affecting commerce", and because the findings of the administrative agency in that case, that the situation did affect commerce, were supported by substantial evidence. This Court said in effect that, irrespective of the separability clause, had it been unable to determine that the Act was limited in its application to situations "affecting commerce", it would have declared the Act unconstitutional, 301 U. S. 1, pages 29-32.

As support for the argument based on the separability clause, and in the absence of any finding by the S.E.C. that the alleged "unfair or inequitable distribution of voting power" or "undue or unnecessary complication of structure" in this case, or the dissolution of American, had, or would have, an effect on interstate commerce, beneficial or otherwise, the Court below (R., Vol. IV, 893) cited *Electric Bond and Share Company* v. *Securities and Exchange Commission*, 303 U. S. 419 (1938), as if that decision of this Court could be taken as such a finding or an adjudication to that effect.

There was, of course, no issue in that case under Section 11(b)(2). As previously stated, this Court expressly separated the registration provisions there involved (Sections 4 and 5) from the other provisions of the Act and did not pass on the other provisions. Furthermore, far from holding that any "unfair or inequitable distribution of

voting power" or "undue or unnecessary complication of structure" in the Bond and Share System (which by statutory definition includes the American System) had any effect on interstate commerce, or that the dissolution of American would have any effect on interstate commerce, the Court simply held that some of its subsidiaries engaged in transactions in interstate commerce and that made American the proper subject of registration for the purpose of securing data for Congress for future legislation. This is a far cry from a finding by the S. E. C., as a basis for its dissolution order in this Section 11(b)(2) proceeding, that there is any "undue or inequitable distribution of voting power" or "undue or unnecessary complication of structure" in the Bond and Share System affecting interstate commerce or that the dissolution of American will affect interstate commerce, beneficially or otherwise.

It must be concluded that Section 11(b)(2) is not limited or related in any way to situations affecting interstate commerce and is not an exercise of the Federal power over interstate commerce.

III. The drastic grant of power, without standards, contained in Section 11(b)(2) violates the due process clause and is an unconstitutional delegation of legislative power.

We submit that Section 11(b)(2) is an unconstitutional delegation of power to an administrative commission because of the absence of any standards or criteria for guidance.

The only guides we have here for the administrative action which destroyed American and took its property and

the property of its security holders are two phrases contained in the first sentence of Section 11(b)(2)*.

The two phrases are: "unfair or inequitable distribution of voting power", and "undue or unnecessary complication of structure" in holding company systems.

These phrases in the context in which they are used do not themselves constitute any guide. In this context they also carry no historical definition. There are no guides for administrative action in relation to these phrases in Section 1 of the Act, as appears from an analysis of that Section contained in the preceding Point II. Nor does the Section or the Act contain any guide as to whose property is to be taken or destroyed by the administrative body to change the feature or features in a structure which it may choose to deem not to comply with the controlling phrases.

The discussion of the two controlling phrases in subdivisions (1) and (2) and of the decisions of this Court in subdivision (3) below proceeds from the standpoint primarily of the possibilities of oppression inhering in a grant of drastic, undefined power and of the due process clause rather than of what is historically a legislative function. We believe that has been the approach of this Court in condemning or upholding grants of power to administrative agencies.

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* The first sentence reads: "It shall be the duty of the Commission, as soon as practicable after January 1, 1938 * * *:

> "(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system."

The "great grandfather" clause, consisting of the second sentence, which does contain a specification, i. e., that four-layer holding company systems shall not be allowed to exist, is not involved in this case.

Here there is too vague and oppressive a grant of power to come within the limits heretofore present in Acts sustained by this Court.

(1) Brief consideration will demonstrate that the phrase "not unfairly or inequitably distribute voting power" is itself not a standard in the context in which it is used here.

This double negative is the equivalent of a requirement to "fairly and equitably distribute voting power". The phrase "fair and equitable" has a well defined meaning in connection with plans of reorganization in equity and under the Bankruptcy Act, and furnishes a test as to the end result to be achieved under a plan of reorganization when a change of legal rights is caused by some other motivation.* But the phrase does not have any meaning in the context in which it is used here, that is, as a basis for directing a change in legal rights.

To illustrate, if, because of insolvency under the Bankruptcy Act or of the prohibition against continuing a four-layer holding company system contained in the great grandfather clause of this Act, a corporation must be reorganized and the bondholders, preferred stockholders and common stockholders have to take some other or new securities, then the phrase "fair and equitable" is a test of the resulting allocation of the other or new securities, in that it requires that the new securities be the substantial

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* *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106 (1939), where this Court, per Mr. Justice Douglas, said (p. 115):

> "The words 'fair and equitable' as used in §77B(f) are words of art which prior to the advent of §77B had acquired a fixed meaning through judicial interpretations in the field of equity receivership reorganizations."

equivalent of their old securities, and that the relative rights and priorities of security holders be preserved.*

Since the phrase "fair and equitable" relates, in its defined meaning in reorganizations, to preserving the substantial equivalent of existing rights, standing alone it can form no basis for directing a change in those rights.

The plain distinction here is pointed up by the provisions of Section 11 itself. In subdivision (d) and subdivision (e) there are provisions that reorganization plans must be, in the terms of the subdivisions, "fair and equitable." Here is a test of the propriety of the end result of a reorganization plan which changes existing rights, requiring that the change preserve existing rights as nearly as may be. The equivalent of that phrase in subdivision (b)(2) cannot at the same time form the basis for directing a reorganization plan, i.e., for changing existing rights.

A situation under Section 11(e) recently before this Court in *Otis & Co.* v. *Securities and Exchange Commission,* 323 U. S. 624 (1945), is a perfect example. There, this Court was considering the sole question whether the test "fair and equitable" set forth in subdivision (e) of Section 11 was met by the terms of a reorganization caused, not by the phrases in the first sentence of Section 11(b)(2), but by the specific direction of the "great grandfather" clause that there shall be no four-layer holding company systems. Because of the prohibition of the "great grandfather" clause there had to be a change in existing legal

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* *Otis & Co.* v. *Securities and Exchange Commission,* 323 U. S. 624, 634, 639-640, 647-648 (1945); *Group of Investors* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.,* 318 U. S. 523, 565 (1943); *Consolidated Rock Products Co.* v. *Dubois,* 312 U. S. 510, 529, 530 (1941); *Ecker* v. *Western Pacific Railroad Corporation,* 318 U. S. 448, 482 (1943); and *Kansas City Railway Co.* v. *Central Union Trust Co.,* 271 U. S. 445, 455 (1926).

rights, and the result had to be "fair and equitable" in the sense of preserving, so far as possible, in the new legal rights the relative rights and priorities of two existing classes of stockholders.* Obviously, the words "fair and equitable" could not have furnished a basis for an intelligible direction for changing the existing legal rights. That direction had to come from another source. The phrase "fair and equitable" simply required that the change preserve as nearly as might be the preexisting rights.

Nor can it reasonably be contended that there is in the Act, apart from Section 11, a basis or direction which gives meaning to this purported directing phrase of Section 11(b)(2). There is no use of the phrase "unfair or inequitable distribution of voting power" in Section 1 of the Act, and the S. E. C. has conceded that Section 1(c) does not operate as a condition on action by the S. E. C. under Section 11(b), all as pointed out in Point II above.

As will more fully appear from the next ensuing Point IV(a), the S. E. C. itself does not state what is meant by "unfair or inequitable distribution of voting power" in the statute, it has not developed or announced any standard of its own as to what the phrase means, and it does not find specifically what is "unfair or inequitable distribution of voting power" in this case. How then can the S. E. C. contend that the statute contains such a standard?

That the delegation of power in the present Act is oppressive in its effect and cannot be sustained under the principles laid down by this Court is even more forcibly demonstrated in connection with the absence from the statute of any guide for the S. E. C. to determine whose

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* This Court there held that a proposed distribution of new securities between the holders of existing common and preferred stocks on the basis of going concern value instead of liquidating value was fair and equitable. No constitutional question of any sort was raised.

proprietary rights are to be destroyed to correct what the S. E. C. determines to be "unfair or inequitable distribution of voting power".

Let us assume that under Section 11(b)(2) the S. E. C. had determined that the preferred stockholders of American should have a specified greater voting power in American (and that is one of the factors hinted at by the S. E. C. (R., Vol. II, 568) as a possible basis of existing "unfair or inequitable distribution of voting power"), then, so far as the provisions of the statute are concerned, the S. E. C. had the free selection of the action to be taken. It might have directed that the preferred stock be given more votes or that the preferred stock be paid off, or (under the S. E. C.'s construction*) that American be dissolved.

Similarly, if the S. E. C. had determined that there was "unfair or inequitable distribution of voting power" by reason of Bond and Share exercising too great a voting power, as against public stockholders, again under the terms of the statute the S. E. C. had the free choice of action to be taken. It might have ordered the votes accorded Bond and Share to be reduced; it might have ordered Bond and Share not to vote its stock; it might have ordered Bond and Share's stock to be trusteed with individuals selected by the S. E. C.; it might have ordered Bond and Share to divest itself of the stock in American; or (under the S. E. C.'s construction) it might have ordered Bond and Share to be dissolved or American to be dissolved.

Under both of these examples, whose property is to be taken depends upon the whim of the S. E. C. There is nothing in the statute to guide the S. E. C. as to whose property rights are to be taken. As construed by the

*Our position is that Congress did not give the S. E. C. any power to dissolve a corporation under Section 11(b)(2) (Point IV (f)).

S. E. C., there is no requirement in the Act that the remedy chosen by the S. E. C. shall be the one naturally and logically flowing from what is found to be "unfair or inequitable distribution of voting power", for the S. E. C. has not selected such a remedy here.

As previously indicated, the S. E. C. has hinted that because of arrearages in dividends the preferred stock should have more voting power. The only logical and reasonable remedy would seem to be to order the preferred stock given more voting power, while the arrearages continue. But instead, the S. E. C. has ordered the preferred stock destroyed and all of American destroyed.

Thus, the S. E. C. has selected from the many available choices the remedy of destroying American. There is certainly no guide to be found in the Act leading from excessive voting power in *Boud and Share* to dissolution of American.

(2) The other of the two controlling phrases in the first sentence of Section 11(b)(2) is "undue or unnecessary complication of structure."

This phrase taken alone also is not a standard, in that it presents no objective meaning as a basis for action. Taking first the words "complication of structure" alone, they present no objective image. The appeal is only to the subjective. It is something in a structure which a particular individual, depending on what his mental calibre and views may happen to be, would regard as complicated.

"Complication of structure" is not only subjective, but it is comparative. Anything beyond the figure "1" is complicated to some minds. Almost unlimited combinations of factors do not appear complicated to other minds. Thus, "complication of structure" is a comparative subjective conception, and adding to it other subjective comparatives,

such as "undue" or "unnecessary", results in no advance in objective thought.

The phrase does no more than to leave it to the minds of whoever may be the current members of the S. E. C. to determine upon holding company structures according to their current wish.

The words do not carry any connotation known to the law or to the public utility industry, nor is there any indication of the standpoint from which "undue or unnecessary complication" is to be judged. Is it a legal standpoint or an economic standpoint? If the latter, is it the standpoint of the general public, the consumers or the security holders?

From the legal standpoint the phrase is meaningless, in that it forms no basis for making changes to give security holders their legal rights. Everyone in the situation already has his legal rights.

From the economic standpoint, Congress has not said whose interest is to predominate, but has delegated that power to the S. E. C.

Congress has not specified that one-layer or two-layer or three-layer systems are "undue or unnecessary complications"; Congress has only prohibited four-layer systems through the great grandfather clause.

As in the case of the other controlling phrase, the S. E. C. does not point out wherein the statute defines "undue or unnecessary complication of structure." The S. E. C. is obviously uncertain as to what it deems to be an "undue or unnecessary complication".

In parts of its Findings and Opinion (*e.g.*, R., Vol. II, 625-627), the S. E. C. speaks as if it thinks it would have been better if historically the system had been erected as a two-layer system or a one-layer system, or would have been better without some of the classes of securities utilized,

as if some of these features might be "undue or unnecessary complications", without specifying which.

There is also mention (R., Vol. II, 625) by the S. E. C. of "pyramiding" and "leverage", as if there were some feature of the system which came within such terms, although not used in the Act, and might constitute an "undue or unnecessary complication."

At other places (R., Vol. II, 568, 626-627, 630-634) the S. E. C. refers to arrearages in dividends on the preferred stock of American, as if these might be an "undue or unnecessary complication of structure". Financial condition is not part of structure and cannot be complication of structure. Structure is not complicated, or more or less complicated, depending on the assets underlying it, or the value thereof, or the earnings of such assets. Certainly the term "complication of structure" is not an apt one for Congress to use, if it intended thereby to authorize the S. E. C. to revamp structures so that each class of securities in each company therein should, for example, have specified coverages as to assets or as to earnings shown by historical earnings records or by estimates of future earnings. Or if Congress intended that operating companies should have only certain types of securities outstanding, and holding companies should have only certain types of securities outstanding, in each case with certain security or lack of security, Congress could have so specified. Language relating to standards of these types is used by Congress in other sections of this Act, for example, Section 7 of the Act, relating to the sale of securities, and in Section 77 and Chapter X of the Bankruptcy Act.

The truth is that the phrase "undue or unnecessary complication of structure" leaves it wide open to the S. E. C. to dictate the set-up of all companies in the public utility field, without even a hint of what is intended by an "undue

or unnecessary complication," or any indication as to the nature of the factors in the structure of a holding company system on which the S. E. C. should operate.

Thus, the S. E. C. may from time to time form new judgments as to the ideal structure of a particular holding company system, or a company therein, and decide that types of structures not theretofore criticized involve "undue or unnecessary complication of structure" or "unfair or inequitable distribution of voting power." Fashions as to structures have changed radically in the last two or three decades. With this wide open delegation, each time the S. E C. determines that a new fashion ought to prevail, it can start a proceeding to compel dissolution of a company which, under the prior fashion, had a structure deemed entirely proper by the S. E. C., or even against a company which the S. E. C. had theretofore changed to conform to an earlier alleged fashion.*

Under the S. E. C.'s construction of Section 11(b)(2) there can logically be no limitation that once the S. E. C. has required a change, the new changed structure is final. Thus, if the S. E. C. is correct that a preferred dividend arrearage** is an "undue or unnecessary complication", such an arrearage could occur in a corporation after the S. E. C. had already changed its structure once or any number of times.

Here, as in the case of the other controlling phrase, there is no assistance rendered by other provisions of the Act, such as Section 1. There is not a line in Section 1 stating what is "undue or unnecessary complication of structure."

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* As will be shown in Point IV(a) and (c), the S. E. C. has not even pointed to any current fashion as a test in this case.

** Dividend arrearages are not a basis for compulsory reorganization even under a bankruptcy reorganization statute. *In re Piccadilly Realty Co.*, 78 F. 2d 257 (C. C. A. 7, 1935).

Going now to the choice by the S. E. C. of the action to be taken to remedy something that the S. E. C. has determined to be an "undue or unnecessary complication of structure", there is no guide whatsoever as to whose property is to be taken. Suppose that the S. E. C. determines that a three strata system is an "undue or unnecessary complication of structure" and that there should be only two strata. It has a number of choices of action to be taken without any guidance from the statute, each with a different effect on the property rights of different groups of investors. The S. E. C., (according to its construction of the statute) might order the top company dissolved; it might order the top company to divest itself of its holdings in the middle company; it might order the middle company to dissolve (according to its construction of the statute); or it might order a merger of two of the strata into one stratum. Certainly this vast power to change the property rights of one group of investors or another is a matter which should be guided by Congressional enactment.

(3) The Court below herein made no contribution to the reasoning in support of Section 11(b)(2) as not being an unconstitutional delegation.* Examination will show that in none of the cases adverted to by the Circuit Courts of Appeals in this case or the *Commonwealth & Southern* case (the only cases dealing with this point regarding Section 11(b)(2)), has this Court upheld a grant of power as oppressive as that contained in Section 11(b)(2). Nor

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* It said only that since the decision of this Court in the *Schechter* case "counsel have hopefully advanced the delegation argument in many cases, without much success", citing cases to be now discussed (R., Vol. IV, 899). This is as much as to say that this Court no longer will invalidate a statute on account of improper delegation. This certainly constitutes an unwarranted assumption on the part of the Court below. Nor did the Circuit Court of Appeals in the *Commonwealth & Southern* case, 134 F. 2d 747, 752 (C. C. A. 3, 1943), make any contribution. It simply stated in one sentence that there was no unconstitutional delegation, citing some of the same cases.

has this Court upheld a grant such as this in decisions rendered subsequent to those decisions of the Circuit Courts of Appeals. The grant involved here is even more oppressive than the grants of power which have been condemned by this Court in recent years.

This Court has sustained a grant to an administrator of power to fix prices of goods and rents and minimum wages where the statute has related the prices or rents to be fixed to prices or rents existing in base periods, with specified factors for adjustments, or has specified the factors to be taken into consideration in fixing the price or wage, thus leaving to the administrator what amounts to a fact-finding duty.* There is no such guiding reference here.

A grant of power to fix quotas of goods to be introduced into commerce has also been sustained where the quota is related by the statute to a definite test period with specified factors of adjustment.** There also the administrator has a mere fact-finding duty, which could be performed by a judge or jury. There is no such criterion here.

There has also been sustained the grant to an administrator of power to set up labeling classifications for foods to conform to the standards to be found in practices of the food industry, with which classifications the industry

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* *Yakus* v. *United States*, 321 U. S. 414 (1944), (Emergency Price Control Act)—maximum prices of meat under the war power.

Bowles v. *Willingham*, 321 U. S. 503 (1944), (Emergency Price Control Act)—maximum rents in defense areas under the war power.

Sunshine Anthracite Coal Co. v. *Adkins*, 310 U. S. 381 (1940), (Bituminous Coal Act of 1937)—maximum and minimum prices for coal.

Opp Cotton Mills v. *Administrator*, 312 U. S. 126 (1941), (Fair Labor Standards Act)—minimum wages.

United States v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533 (1939), (Agricultural Marketing Agreement Act of 1937)—prices of milk.

** *Mulford* v. *Smith*, 307 U. S. 38 (1939) (Agricultural Adjustment Act of 1938)—tobacco quotas.

must thereafter conform.* Here was no more than a fact-finding duty involved in setting up the labeling classifications. There is no such direction in this Act to set up a system of classification, or a set of standards, of general application in advance of enforcement action by the administrative agency.

A grant to an administrative body of the power to disapprove acquisition of control of transportation facilities when not in the public interest has been sustained by this Court, on the ground that the term "public interest" carries with it historically defined concepts.** The foregoing discussion in this Point III shows that there is no such historically defined concept carried by the controlling phrases in Section 11(b)(2).

Similarly, the power to set up a general licensing system with respect to broadcasting, governed again by this historically defined standard of the "public interest," has been upheld on that basis and under the authority of the transportation case just referred to.*** Contrasted with that situation, here there is no historical definition carried by the statute, and certainly there is no provision for setting up a generally applicable system of standards in advance of enforcement action by the administrative agency. Instead we have a grant of power to dictate in each individual case without reference to any general system of standards set up either by Congress or by the administrative agency.

It will be observed that in all these cases, relied on by the two Circuit Courts of Appeals or subsequently decided by

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* *Federal Security Administrator* v. *Quaker Oats Co.*, 318 U. S. 218 (1943), (Pure Food and Drug Act)—Farina.

** *New York Central Securities Co.* v. *United States*, 287 U. S. 12, 25 (1932), (Transportation Act of 1920). (Control by N. Y. Central of Big Four in public interest).

*** *National Broadcasting Co.* v. *United States*, 319 U. S. 190 (1943), (Federal Communications Act), relying expressly, at p. 225, on *New York Central Securities Corporation* v. *United States*, 287 U. S. 12, 25 (1932) *supra*.

this Court, there were either (a) definite standards specified in the statutes, or (b) the standard given in general terms, such as the "public interest", was held to be one which had been historically defined.*

It should be pointed out that the statutes in the cases just discussed had another common characteristic not present in Section 11(b)(2). The result on the offender or the action to be taken by the administrative body was clear from the statute, that is, penalties for non-compliance with the prescriptions of the administrative body were specified, or violators were barred from commerce, or those determined to have failed to qualify were not to be granted licenses or approvals.

On the opposite side of the line must be placed the statutes condemned by this Court in *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495 (1935), ** and in *Small Company* v. *American Sugar Refining Co.,* 267 U. S. 233 (1925).

In the *Schechter* case, this Court held invalid, as in violation of the due process clause, Section 3 of the National Industrial Recovery Act, authorizing the President to approve "codes of fair competition" for various industries, with which members of such industries were to comply. The term "fair competition" was held not to carry any historical definition. It was not used in the sense of eliminating business practices generally accepted to be "un-

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* The Court below herein also cited (R., Vol. IV, 899) *Hirabayashi* v. *United States,* 320 U. S. 81 (1943), which does not bear on the point under discussion. There Congress had specifically approved, by subsequent legislation, a military curfew on citizens of Japanese ancestry in military areas, prescribed by a military commander under the war power, and conviction for violation of the curfew subsequent to such Congressional action was upheld. The real point at issue was the alleged improper discrimination against citizens by reason of ancestry.

** Expressly reaffirmed by the majority of this Court in *Yakus* v. *United States,* 321 U. S. 414, 424 (1944), although Mr. Justice Roberts, who was in the minority, considered the *Schechter* case overruled by the majority (p. 451).

fair competition" as in the Federal Trade Commission Act. The term was used for the purpose of putting into effect whatever might be deemed at the moment to be helpful to an industry. Mr. Justice Cardozo said in his concurring opinion, on this point (pp. 552-3):

> "By this other conception a code is not to be restricted to the elimination of business practices that would be characterized by general acceptation as oppressive or unfair. It is to include whatever ordinances may be desirable or helpful for the well-being or prosperity of the industry affected. In that view, the function of its adoption is not merely negative, but positive; the planning of improvements as well as the extirpation of abuses. What is fair, as thus conceived, is not something to be contrasted with what is unfair or fraudulent or tricky. The extension becomes as wide as the field of industrial regulation. If that conception shall prevail, anything that Congress may do within the limits of the commerce clause for the betterment of business may be done by the President upon the recommendation of a trade association by calling it a code. This is delegation running riot."

In the *Small* case, the Lever Act was held invalid as a violation of the due process clause, because it required conformity to no specified historically defined standard. The statute prohibited "unjust or unreasonable" charges and "excessive prices for any necessaries".*

From the discussion in the preceding subdivisions (1) and (2) of this Point III, it is apparent that the controlling

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* The Court of Appeals, in *Engineers Public Service Company* v. *Securities and Exchange Commission*, 138 F. 2d 936 (C. of A., D. C., 1943), indicated (p. 951) that if under the proviso of Section 11(b)(1) the choice of a system to be retained by a holding company were left to the S. E. C., there would be serious doubts of constitutionality because of the absence of standards for the guidance of the S. E. C. This difficulty compelled the Court to construe the proviso as leaving the choice to the holding company. Correspondingly, Section 11(b)(2) is unconstitutional in leaving the choice of action to be taken to the S. E. C. without any standards for its guidance.

phrases in Section 11(b)(2)—"unfair or inequitable distribution of voting power" and "undue or unnecessary complication of structure", also carry no historical definition and are just as vague and undefined as the phrases involved in the *Schechter* and *Small* cases. The phrase "unfair or inequitable" distribution of voting power, as used in the context here (and not as in subdivisions (d) and (e) of Section 11), is analogous to the term "fair competition", as used in its context in the statute involved in the *Schechter* case. The phrase "undue or unnecessary" complication here is analogous to the phrase "unjust or unreasonable" charges as used in the statute involved in the *Small* case. These grants of power here are not comprised in a statutory administrative program such as led to the upholding of the grants of power in the other cases just discussed. On that basis alone, Section 11(b)(2) should be held invalid.

What we emphasize, however, is that the statutory administrative scheme comprised in Section 11(b)(2), taken as a whole, is even more oppressive than the statutory schemes involved in the *Schechter* and *Small* cases. At least in those cases the result of transgression on the transgressor was clear, and it was not left, as here, to the whim of the administrative agency to determine whose property is to be taken or destroyed and to what extent, in order to remedy what the agency may determine to be a transgression.

IV. The order of dissolution violates the due process clause, is not authorized by Section 11(b)(2), and is not supported by substantial evidence.

Apart from the lack of constitutional basis for the statute already discussed, the order itself and the proceedings before the S. E. C. were invalid for several reasons. These

are: (a) No standards have been developed or announced by the S. E. C. on the basis of which there is any "unfair or inequitable distribution of voting power" or "undue or unnecessary complication of structure" which would be remedied by the dissolution of American; (b) To the extent that the order rests on statements in the Findings and Opinion regarding past lawful acts, Section 11 (b)(2) is an unconstitutional *ex post facto* law; (c) Purported findings relied on by the S. E. C. to support its order are fundamentally defective on their face; (d) The order rests on statements in the Findings and Opinion regarding values, yet American was denied a hearing on this issue; (e) The S. E. C. arbitrarily refused to hold hearings on American's voluntary Plan for reorganization; (f) Section 11(b)(2) cannot be construed as authorizing the S. E. C. to dissolve any corporation; and (g) Dissolution of *American* is an unreasonable, arbitrary and oppressive means of remedying alleged defects in the *Bond and Share* System.

(a) No standards have been developed or announced by the S. E. C. on the basis of which there is any "unfair or inequitable distribution of voting power" or "undue or unnecessary complication of structure" which would be remedied by the dissolution of American.

It has already been shown in Point III that Section 11(b)(2) presents no standard for action by the S. E. C. If Congress may thus leave to an administrative agency the power to develop or fix standards,* then the action of the S. E. C. in this case is still unconstitutional as a violation of the due process clause. This is because the S. E. C. itself has not developed or announced any standard for determining that there is here any "unfair or inequitable

* Cf. *Securities and Exchange Commission* v. *Chenery Corporation*, 318 U. S. 80, 92-93 (1943).

distribution of voting power'' or ''undue or unnecessary complication of structure'' which would be remedied by the dissolution of American.

One would expect to find in the Findings and Opinion of the S. E. C. a basic statement of what the S. E. C. determines to be violative of the supposedly activating phrases of Section 11(b)(2) under which the S. E. C. purports to act. Instead we find mere reiteration of the two statutory phrases with the statement that what is condemned by the statute is present in the Bond and Share System, all without specification of any standard that is violated. The S. E. C. does mention (1) computations regarding the percentage interests of various groups of security holders as compared with their voting power, (2) arrears in dividends on American's preferred stock, (3) the three-layer structure of the Bond and Share System as related to American and the latter's subsidiaries, (4) American's alleged lack of economic function, (5) so-called ''pyramiding'' and ''leverage'', and (6) the two senior classes of securities of American.

Brief analysis shows that nothing mentioned by the S. E. C. violates any standard which has been established by the S. E. C. or could properly be established by the S. E. C. as a basis for action by it.

(1) The Findings and Opinion contain computations, not treated by the S. E. C. as conclusive, apparently designed to show that percentage of voting power does not correspond to percentage of financial interest vested in various classes of security holders (R., Vol. II, 619-622, 665). Included in these computations are *bonds* of subsidiaries and *debentures* issued by American and held by the public. It is wholly fallacious, in computing the percentage interests in the companies of stockholders having voting power to include in the computation the amount of bonds and de-

bentures, so as to arrive at a diluted percentage interest. By doing so, the S. E. C. implies that an "unfair or inequitable distribution of voting power" may result from the fact that the bondholders and debenture holders do not have any voting power. But under any standard set up by the S. E. C. it is not "unfair or inequitable" for bondholders or debenture holders not to have voting power. The S. E. C. approves the issuance of unsecured bonds of holding companies which do not carry a vote. *E.g., In the Matter of Community Power and Light Company* (Holding Company Act Release No. 3676, July 18, 1942; and No. 3794, September 19, 1942). Certainly there are no standards outside the decisions of the S. E. C. suggesting that bondholders or debenture holders should have a vote. It is common knowledge that it is an unusual feature, permitted by the statutes of only a few states, to give bondholders a vote along with stockholders for the election of directors or on other corporate matters not specifically affecting such bonds.

The Findings and Opinion mention the voting power in American of its public stockholders and of Bond and Share, stating that Bond and Share has 20.7% of such power, so that the public has 79.3% of such power (R., Vol. II, 617). It is also mentioned that Bond and Share's financial interest is very small as compared with that of the public (R., Vol. II, 621). At the same time it appears that the public has cast in the last six years (1935-1941) 63% of all votes cast and Bond and Share only 37% (R., Vol. II, 617). The public has therefore had, and has exercised, the dominant voting power. It is certainly not in accordance with any possible standard for the S. E. C. to dissolve American because, according to the S. E. C., Bond and Share should have had 4½% voting power (corresponding to its percentage interest of the book value of American's stocks), instead of 20.7%.

(2) By calling attention to the lack of a charter provision for increasing the voting power of the preferred stock of American while dividends are in arrears (R., Vol. II, 568), the S. E. C. may imply, but without so stating, that voting power is inequitably distributed, while such arrearages exist, between the holders of the preferred stock and the holders of the common stock.

Certainly there is no evidence in the record that the holders of the preferred stock have complained of the lack of a provision increasing their vote. The contrary is indicated. The record shows that in the period subsequent to the passage of the Act, 1935 to 1941, a greater percentage of the public holders of preferred stock have voted than the public holders of common stock, and that they have voted in favor of the present management (S. E. C. Exs. 49 and 49A; R., Vol. I, 201; Tr., 18156).

Moreover, arrearages in dividends on the preferred stock cannot be the "undue or unnecessary complication" found by the S. E. C. here, for that would only require reclassification of the preferred and common stocks as ordered by the S. E. C. in the *Commonwealth & Southern* case.

Clearly there is no possible standard which could call for destroying the voting power of the holders of the preferred stock, along with the voting power of the holders of the common stock, because, according to the S. E. C., the preferred stock has too little voting power.

(3) That Bond and Share, American, and the latter's subsidiaries constitute a three-layer structure cannot *per se* be an "undue or unnecessary complication", for the "great grandfather" clause in the second sentence of Section 11(b)(2) by forbidding only four-layer systems contemplates the continuance of three-layer systems.

While the S. E. C. conceded (R., Vol. II, 625) that the corporate chart of the Bond and Share System (R., Vol. II,

657, Appendix A) appeared relatively simple, consisting of a top holding company on the first level, sub-holding companies on the second, and subsidiaries of the latter on the third, it found that this first impression was wholly delusive because each operating company had a complex structure (generally bonds, preferred stock and common stock) upon which were imposed the holding companies' securities (debentures, preferred stock and common stock), and then the preferred stock and common stock of Bond and Share.

The S. E. C. stated that some of the operating companies also had subsidiaries which had different classes of securities outstanding so that income derived from the "generation and sale of electric energy and gas" did not reach the common stockholders of Bond and Share until it had been "filtered through seven to fourteen classes of securities having prior claims to such earnings" (R., Vol. II, 625, 626).

It may be remarked that the conduit of income allegedly through fourteen classes of securities is hyperbole.* The possible single instance in the American System was where a utility company in developing gas properties had found it desirable to organize certain non-utility companies to develop the production and sale of oil obtained in connection with the production of gas, and the income so derived was not from the sale of electric energy or gas. The seven classes of securities mentioned by the S. E. C. are the typical classes existing in the extreme tier from the bonds of the operating company to the common stock of Bond and Share.

This superimposition of tiers of securities upon each other was said to make it difficult for the investor accu-

* Furthermore, we are unable to find factual support in the record for this statement and believe it to be unfounded.

rately to appraise the income which would accrue to his securities, particularly in the case of Bond and Share (R., Vol. II, 627), and the evil was said to be magnified by the mounting arrearages on the preferred stocks of American (R., Vol. II, 630-634). Thus the system was found to be unduly complicated, and also unnecessarily so on the alleged ground that American did not perform, and had not performed, any necessary functions either for its investors or for its subsidiaries (R., Vol. II, 634).

This whole theory of corporate complexity of the American System is based upon a loose generalization predicated on a particular instance or instances in the Bond and Share System as a whole, and as applied to American dissolves into thin mist on factual analysis.

The mere existence of three tiers of companies in the Bond and Share System did not justify an order for the dissolution of American. If the evil found to exist by the S. E. C. was solely the superimposition of Bond and Share on the corporate and capital structure of the American System, the obvious remedy should have been the elimination of Bond and Share's interest in the American System, which, incidentally, is now proposed by Bond and Share itself in a plan recently filed under Section 11(e) of the Act (Holding Company Act Release No. 5970, August 6, 1945).

If, on the other hand, the evil found to exist by the S. E. C. was the fact that certain utility subsidiaries had underlying subsidiaries, the obvious remedy should have been the "folding in" of those underlying subsidiaries or their sale. That such a remedy would have been feasible is indicated by what has transpired since the date of the S. E. C. order. It appears from Appendix A to the S. E. C. opinion (R., Vol. II, 657) that American had sixteen utility subsidiaries, eleven of which had no subsidiaries, two of which had only one subsidiary and only three of which had

two or more subsidiaries. Through sale or absorption by their respective parents, and in many instances with approval of the S. E. C., most of these subsidiaries of American's utility subsidiaries have disappeared from the American System.* An order providing either of these remedies would have removed from the system one tier of companies and several classes of securities.

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* The five utility subsidiaries which are shown as having subsidiaries in Appendix A and their present position with respect to such subsidiaries are as follows:

Florida Power & Light Company has retained Consumers Water Company and has acquired, with the approval of the S.E.C., Utilities Land Company which was formerly a direct subsidiary of American (Holding Company Act Release No. 4791, December 30, 1943).

Minnesota Power & Light Company owns all the assets once owned by Great Northern Power Company, which continues in existence only as a shell company by reason of an outstanding bond issue. In addition the S. E. C. has authorized and found necessary and appropriate to the enforcement of the Act the acquisition by Minnesota of the stocks of American's former direct subsidiaries, Superior Water, Light and Power Company (which had previously acquired the properties of Northern Power Company, another direct subsidiary of American), Pike Rapids Power Company, and Topeka Land Company (Holding Company Act Release No. 5850, June 7, 1945).

The Montana Power Company caused the dissolution of its subsidiary Glacier Production Company after that company had disposed of all its properties (Holding Company Act Release No. 5463, December 1, 1944), and the three subsidiaries of Glacier Production Company, namely, Inland Empire Refineries, Inc., Chief Petroleum Company, Inc., and Moen-Leick Industries, Inc. were eliminated from the system at the same time. The Montana Power Company also caused the dissolution of its subsidiary Great Falls Townsite Company.

Pacific Power & Light Company has absorbed its subsidiary Inland Power & Light Company (Holding Company Act Release No. 3505, May 5, 1942) and has disposed of its interest in Yakima Credit Company, its only remaining statutory subsidiary being R. S. & C. Irrigation Company, Inc., which operates a small cooperative irrigation project.

The Washington Water Power Company has disposed of its interest in Chelan Valley Credit Corporation, and Spokane United Railways, its other subsidiary, has sold all its properties and is awaiting formal dissolution.

(4) The S. E. C. says (R., Vol. II, 634) that American is unnecessary to its investors and that American does not service the subsidiaries. But American services its own securities, protects the interests of its security holders, and further performs the economic function for its investors of diversifying their investment in the public utility field. This could not be accomplished as a practical matter by the average small investor and is an investment function which has nowhere been condemned but, on the contrary, has been praised by investment authorities. Nor can the S. E. C. point to any line of authority of any sort that it is an essential function of a holding company that it service its subsidiaries. Many of the important holding company systems in the country have no service organization, but the Commission has not suggested their dissolution for that reason.* American is essentially an investment company in the public utility field. Investment companies generally are not condemned by the Federal statutes, but simply regulated under the Investment Company Act. Investment companies do not service or manage the companies whose securities they hold. This fact does not nullify their economic function for the investor.

The S. E. C. also says (R., Vol. II, 634) that American lacks economic function because it entails unnecessary expense. However, there must be offset against such expense the advantages mentioned in the preceding paragraph and the large savings in dividend paying and stock transfer ex-

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* *In the Matter of Federal Water and Gas Corporation* (Holding Company Act Release No. 4113, Feb. 11, 1943); *In the Matter of The North American Company* (Holding Company Act Release No. 3405, April 15, 1942); *In the Matter of Community Power and Light Company* (Holding Company Act Release No. 3676, July 18, 1942. In *In the Matter of The Commonwealth & Southern Corporation* (Holding Company Act Release No. 2626, March 19, 1941), the Commission, while permitting continuance of the holding company but restricting the scope of its operations, ordered the service organization to be discontinued.

pense (mentioned in Point I above), and there have been substantial income tax savings due to ability to file consolidated returns for American and its subsidiaries under current laws.*

The S. E. C. says (R., Vol. II, 634) that American entails "serious complications from an investment point of view in respects indicated above". The respects "indicated above" are the allegation that it is difficult for an investor in Bond and Share to calculate the earnings applicable to his securities in Bond and Share. These criticisms cannot be seriously advanced as a standard for dissolution of American and the destruction of its property and that of its public investors.

(5) The S. E. C. refers (R., Vol. II, 625) to "pyramiding" and "leverage" being present. Not only is there no reference to "pyramiding" and "leverage" in the statute, but also the S. E. C. has not developed or announced any standard of what constitutes a degree of "pyramiding" or "leverage" which is improper. "Pyramiding" and "leverage," as such and without definition as to degree, cannot be improper. There is always "pyramiding" if there exists one company owning less than 100% of the securities of another. Correspondingly, there is always "leverage" when there is one class of security senior to another in even one company and the superimposition of a holding company does not *per se* increase the leverage. The S. E. C. in no way indicates, by announcing a standard or other-

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* A computation of income tax savings does not appear in the record, since the current Federal tax laws were enacted after the closing of the record. An approximate computation made under such laws from data in the record makes it appear that there were savings through a consolidated income tax return in at least the amount of $2,000,000 for 1942.

wise, how much "pyramiding" or "leverage" is "undue or unnecessary complication."

(6) Nor can any of the senior classes of securities of American be an "undue or unnecessary complication" under any standard erected or announced by the S. E. C. Unsecured bonds of a holding company, like the debenture bonds of American, have been held by the S. E. C. not to be a violation of Section 11(b).* At any rate there is no need to dissolve American on account of such bonds. The $45,000,000 issue could easily be paid off. Similarly, the preferred stock of a holding company cannot constitute an undue or unnecessary complication, for the S. E. C. held, in the same case just cited in the footnote, that such a preferred stock was not a violation of Section 11(b).

By reason of this lack of a developed or announced standard or even of any basic finding as to wherein there is any "unfair or inequitable distribution of voting power" or "undue or unnecessary complication of structure", the action of the S. E. C. cannot be deemed due process and its order must be considered unconstitutional as violative of the Fifth Amendment. This is so whether the administrative body is required first to develop standards and then apply them (*Chenery* case, *supra*, 318 U. S. at pp. 92-93) or may proceed case by case to fix them (*Chenery* case at p. 99).

(b) To the extent that the order rests on statements in the Findings and Opinion regarding past lawful acts, Section 11(b)(2) is an unconstitutional *ex post facto* law.

If the controlling phrases of Section 11(b)(2), "unfair or inequitable distribution of voting power" and "undue

* e.g., *In the Matter of Community Power and Light Company* (Holding Company Act Release No. 3676, July 18, 1942, Release No. 3794, September 19, 1942).

or unnecessary complication of structure", relate to acts committed in the past in building up the structure or in distributing voting power, and property rights are taken on account thereof, then Section 11(b)(2) imposes a penalty for past legal acts and is an *ex post facto* law within the prohibition of Article I, Section 9, of the Constitution.

The Findings and Opinion of the S. E. C. contain numerous statements relating solely to acts performed prior to the passage of the Act which were not illegal when performed but which are now condemned by the S. E. C. (e.g., R., Vol. II, 563-565, 617-618, 619). If these facts are to any extent the basis for determining that there is "unfair or inequitable distribution of voting power" or "undue or unnecessary complication of structure" here, then this application of the Act would be within the prohibition of Article I, Section 9, of the Constitution. In view of the prohibition, it would also be a violation of the due process clause for an order to be based on findings regarding such past legal acts.

A law need not be in form a *criminal law* to violate the prohibition of Article I, Section 9. To be an *ex post facto* law, a law need only impose a penalty, such as the taking of property, for past acts which did not violate any law at the time committed.

Fletcher v. Peck, 6 Cranch, 87 (1810) (annulling title to real property);

Cummings v. The State of Missouri, 4 Wall. 277 (1866) (denial of right to hold office and practice profession);

Ex parte Garland, 4 Wall. 333 (1866) (denial of right to practice profession);

Pierce v. Carskadon, 16 Wall. 234 (1872) (denial of right to defend legal proceeding).*

Take two holding company systems existing today with exactly the same structure, that is, the same number of companies and the same classes of securities in each company. Suppose that the S. E. C. has no objection to the structure in and of itself. But then suppose that the S. E. C. finds that one system was built up by legal means which the S. E. C. now deems improper or unnecessary or unfair

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* In *Fletcher* v. *Peck*, 6 Cranch, 87 (1810), *supra*, the Court said (p. 137):

> "An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed. Such a law may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared, by some previous law, to render him liable to that punishment. Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the legislature the power of seizing, for public use, the estate of an individual, in the form of a law annulling the title by which he holds that estate? The court can perceive no sufficient grounds for making this distinction. This rescinding act would have the effect of an *ex post facto* law. It forfeits the estate of Fletcher for a crime not committed by himself, but by those from whom he purchased. This cannot be effected in the form of an *ex post facto* law, or bill of attainder; why then, is it allowable in the form of a law annulling the original grant?"

In *Cummings* v. *The State of Missouri*, 4 Wall. 277 (1866), *supra*, the Court said (pp. 327-328):

> "The clauses in the Missouri constitution, which are the subject of consideration, do not, in terms, define any crimes, or declare that any punishment shall be inflicted, but they produce the same result upon the parties, against whom they are directed, as though the crimes were defined and the punishment was declared. * * * They are aimed at past acts, and not future acts." * * *
>
> "Now, some of the acts to which the expurgatory oath is directed were not offences at the time they were committed. * * * Clauses which prescribe a penalty for an act of this nature are within the terms of the definition of an *ex post facto* law—'they impose a punishment for an act not punishable at the time it was committed.'"

and the other was built up by legal means which the S. E. C. does not now deem improper or unnecessary or unfair. Clearly, if the S. E. C. were to enter an order against the first system or any company therein under Section 11(b)(2), changing property rights on account of the historical events, this would be an infliction of a penalty for acts which were legal at the time committed and would violate Article I, Section 9, of the Constitution.

It is, therefore, obvious that the S. E. C. must abandon any position that the order issued under Section 11(b)(2) can be sustained by findings of the S. E. C. regarding acts occurring prior to the enactment of the Act.

(c) Purported findings relied on by the S. E. C. to support its order are fundamentally defective on their face.

We have already shown in Point II that the Findings and Opinion contain no jurisdictional findings that there is any "unfair or inequitable distribution of voting power" or "undue or unnecessary complication of structure" affecting interstate commerce.

We have shown in subdivision (a) of this Point IV that the S. E. C. has not developed or announced in its Findings or Opinion any standards by which any feature in the Bond and Share System relating to American constitutes "unfair or inequitable distribution of voting power" or "undue or unnecessary complication."

Statements in the Findings and Opinion regarding past legal acts cannot support the order of the S. E. C. (Point IV(b)).

What other findings* are there then, in the Findings and Opinion, and can they support an order of dissolution of American?

The S. E. C. preceded a specific discussion of American with a general discussion of the Bond and Share System,

* Findings on the subject of present values cannot support the order because of denial of a hearing (Point IV(d)).

including not only American and Electric Power & Light Corporation, but also American Gas and Electric Company, National Power & Light Company and American & Foreign Power Company Inc., none of which is presently involved. Aggregating the consolidated capital of these five holding companies, it found that Bond and Share's control resulted from a holding of voting securities representing 1.85% of the total combined consolidated capitalizations of the five subholding company systems (R., Vol. II, 613-618). This is, of course, a perfectly meaningless exercise in abstract mathematics. The problem is of necessity a separate one as to each company.

The S. E. C. continues with a discussion of voting power which is wholly fallacious (R., Vol. II, 613-622).

One fallacy is to proceed on the basis that debt securities and preferred stock should have a vote. Both Bond and Share's and American's holdings in subsidiary capitalization, which consist primarily of voting securities, are compared with total consolidated capitalization, including debt and non-voting preferred stocks, without any reference to position or function of the securities in the system. The aggregate capitalization of the subsidiaries of American as per their books is $729,000,000, of which $361,000,000 is represented by debt securities, leaving $368,000,000 represented by the preferred and common stocks. American owns $254,000,000 of these preferred and common stocks, or approximately 69% of the stock capital (R., Vol. II, 665, Appendix E-2; Consolidating Balance Sheet and supporting schedules, Ex. D to 1941 Form U5S of American; R., Vol. I, 262).

As has already been mentioned in subdivision (a)(1) of this Point IV, it has never been contended by the S. E. C. that debt should have a vote in literally hundreds of financing applications which it has approved. It

is uniformly recognized that 50%, and in many cases, more, of the capital may be represented by non-voting bonds or other debt securities.*

Non-voting preferred stock, to the extent of approximately half the remaining capital, has likewise been recognized in many cases, subject only to the qualification affording limited voting rights in specific cases, and controlling voting rights in case of accumulated arrearages on preferred stocks.**

Arrearages on the preferred stocks of subsidiaries are negligible and at the time of the order existed only in the case of a single subsidiary, Portland Gas & Coke Company (R., Vol. II, 540).

Arrearages in preferred dividends of American afford no grounds for American's dissolution and destruction of its interest in its subsidiaries from which source alone the arrearages may eventually be compensated. If American were to be reorganized by the S. E. C. and new preferred securities issued to compensate for the arrearages, under its uniform practice the S. E. C. would require voting control to be vested in the preferred stock whenever the arrears exceed some specified amount.

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* *In the Matter of Indiana Hydro-Electric Power Company* (Holding Company Act Release No. 5027, May 6, 1944)—long term debt 57.96% and preferred stock 59% of remaining capital; *In the Matter of The California Oregon Power Company* (Holding Company Act Release No. 3728, August 12, 1942)—long term debt 49.6% and preferred stock 45% of remaining capital; *In the Matter of Community Power and Light Company* (Holding Company Act Release No. 3676, July 18, 1942)—long term debt 62.3% and preferred stock 59% of the remaining capital. These are merely illustrations of a large number of decisions approving similar ratios.

** See cases cited in preceding footnote, and also: *In the Matter of Atlantic City Electric Company* (Holding Company Act Release No. 3328, Feb. 16, 1942); *In the Matter of Cities Service Company* (Holding Company Act Release No. 3711, August 5, 1942), and *In the Matter of Central Maine Power Company* (Holding Company Act Release No. 3883, Nov. 5, 1942).

Such a remedy was, in fact, unnecessary here since American had filed a plan in this proceeding directed to a reclassification of stock under which the presently outstanding preferred and common stocks would be retired and one class of new common stock issued in lieu thereof. In such proceeding all inequities due to voting control that might be found by the S. E. C. would, of course, be eliminated. For the S. E. C. to require *dissolution* of American based on the absence of controlling voting power in the preferred stock was definitely capricious.

The S. E. C. also proceeded on the basis of tentative figures as to which it abstained from making findings and then made fallacious use of those figures.

The S. E. C. found the total capitalization of American's subsidiaries (including long-term debt and surplus) was $729,143,155 (R., Vol. II, 619). Assuming the integrity of these figures based on book values, the securities of subsidiaries owned by American have a book value of $303,837,930, or approximately 41.67% of the total capital including surplus contributed by all security holders (*Id.*). But the S. E. C. stated the integrity of these book figures was brought in question by evidence of system "write-ups", and "*if the apparent system write-up* in each of these companies, as indicated in the present record, be deducted from the underlying book value of the securities owned by American", it appeared that securities owned by American represented only 21.41% in the capitalization of its subsidiaries (R., Vol. II, 619-620).*

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*It should also be noted that the "write-ups" referred to are not "write-ups" as understood by accountants, namely an upward reappraisal of assets by a company. The staff of the S. E. C. seem to regard as a "write-up" the full difference between the stated value of securities of a company issued as representing the value of properties at the time acquired and the cost of such properties to any other company in the same "system" irrespective of when those properties were acquired, how long they were held, or what had been done to enhance their value while so held.

But the S. E. C. stated that even these figures were based on assumed values of surplus accounts and "*substantial further adjustment may be necessary* because of the probable inadequacy of the reserves for retirements" and that "*if* such inadequacy be measured" by comparison between book accruals and the amounts claimed or allowed for depreciation for Federal income tax purposes, then securities owned by American would represent only 4.75% of the capitalization of the subsidiaries (R., Vol. II, 620).* By this process American's equity in subsidiaries, which cost it over $250,000,000, was reduced to $21,189,046 (R., Vol. II, 665, Appendix E-2, Col. 13).

The S. E. C. further stated that considering this capital structure as part of the structure of the Bond and Share System, its inequity was magnified, for Bond and Share had effective control through a holding representing only 3.42% of the total capitalization of American's subsidiaries before adjustment for write-ups and depreciation (R., Vol. II, 621-622).

The Commission concluded: **"On the basis of the foregoing figures,** it is apparent we must find that voting power

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* It was conceded by the S. E. C. that the result of such comparison was not a "conclusive figure" but merely one which has "frequently been found helpful" (R., Vol. II, 620). That such comparison is unrealistic is obvious from the fact that the S. E. C.'s computations indicate an adjustment for depreciation in the case of the Florida Power & Light Company of $22,165,213 (R., Vol. II, 665, Appendix E-2, Col. 11), whereas, in the proceeding directed to the recapitalization of the Florida Company so as to cause it to comply with the Act, instituted by the S. E. C. under Section 11(b)(2), an adjustment in the depreciation reserve of that Company of only $2,400,000 was required by the S. E. C. (Holding Company Act Release No. 4791, Dec. 30, 1943). In like manner the S. E. C.'s computations indicate an adjustment for depreciation for Texas Electric Service Company and Minnesota Power & Light Company of $7,284,133 and $9,322,873 respectively, a total of $16,607,006, but in subsequent recapitalizations of these companies approved by orders of the S. E. C., the Commission required no such adjustments (Holding Company Act Releases Nos. 5742 and 5850, April 21, 1945, and June 7, 1945).

is unfairly and inequitably distributed among the security holders of the American system, and among the security holders of the American-Bond and Share system: and that accordingly the continued existence and capital structure of American unfairly and inequitably distribute voting power among security holders of the Bond and Share system" (R., Vol. II, 622).

Obviously the first clause of this finding is entirely outside the scope of the issues presented by the notice and order for hearing of May 9, 1940 as limited by the subsequent order of June 7, 1940, confining the issue to the Bond and Share System and not extending to the American System as such. Beyond this the finding is utterly inadequate to afford a basis for an order dissolving American.

Upon its theory that justification of a dissolution order may be found in the ratio between the values of subsidiary securities held directly by American and indirectly by Bond and Share, respectively, to the total values of all subsidiary securities in the system, the S. E. C. had to reach two separate and distinct conclusions: first, that the figures indicating the extent of interest of American in its subsidiaries were such as to justify the finding that voting power is unfairly and inequitably distributed among security holders in the *American System*, and, second, that voting power is unfairly and inequitably distributed among the security holders in the combined *Bond and Share-American System*. With respect to the latter finding, the S. E. C. was content to adopt the book values in the belief, doubtless, that a holding by Bond and Share representing only 3.42% of the total capitalization of American's subsidiaries before adjustments was adequate to support an order for liquidation or dissolution in some form of Bond and Share's interest in American.

But with respect to American, the comparable ratios definitely found by the Commission were the book figures, according to which American owned 41.67% (represented principally by voting securities) of total capital, including surplus. The S. E. C. was apparently (and we think quite justifiably) not satisfied to rest an order of dissolution of American upon such a finding. Therefore it made purely hypothetical adjustments on mathematical formulae for so-called "apparent" write-ups, and possible under depreciation upon which it makes not even an "apparent" finding.

By this purely mechanical process adopted as a hypothesis for the purpose of a result, it reached its percentage of 4.75% of the capitalization of subsidiaries, thereby reducing American's admitted investment of over $250,000,000 to a value of approximately $21,000,000.

But beyond this a false method of computation, even on its own assumptions, was employed by the S. E. C. The percentages were determined for all properties as a group and the system was condemned on an overall basis. Where the computation showed American's investment in a subsidiary to be less than nothing such negative amount was deducted from the amounts which represented a positive investment in other subsidiaries (R., Vol. II, 665, Appendix E-2, Col. 13). Certainly there can be no logical reason for judging the fairness of American's voting control of subsidiaries in which it has a large equity investment on the basis of a claimed deficiency in its equity in some other subsidiary.* In the case of seven of the companies listed

* An analysis of column 13 in Appendix E-2 referred to in the text, shows positive investment in subsidiaries, even after these hypothetical deductions for write-ups and depreciation in those particular companies, of $47,879,054, from which is deducted the sum of $26,690,008, representing the alleged deficiencies in capital accounts if adjusted for so-called apparent write-ups and depreciation in other subsidiaries. The difference between these two figures yields the $21,189,046 used by the S. E. C. to arrive at its result.

American's investment is practically 100% of the total subsidiary capitalization.

There was another fallacy introduced by the S. E. C. in order to produce this 4.75 percent, appearing on the face of the Findings and Opinion. American owns not only common stock in its subsidiaries but also other classes of securities, including bonds which are senior to securities of the subsidiaries outstanding in the hands of the public (R., Vol. II, 659). But after the S. E. C. calculated the hypothetical write-ups and the hypothetical deficiencies in depreciation reserves for a subsidiary, the S. E. C. deducted the whole adjustment from all of the securities of the subsidiaries *owned by American;* that is, in some instances it wiped out the common stock of the subsidiary owned by American and then cut into the face amount of the bonds of the subsidiary owned by American (R., Vol. II, 665). Obviously, this is an improper method of computation, for after wiping out the common stock of the subsidiary owned by American, the calculation could only result in cutting into the value of the preferred stock of that subsidiary in the hands of the public before it would cut into the face amount of the bonds of the subsidiary held by American.*

Purely as illustration of the unreality of the S. E. C.'s approach to the issue before it we cite three instances of recent occurrence. The S. E. C. in its Appendix E-2 (R., Vol. II, 665) arrived at a net deficit in American's equity in the Nebraska Power Company of $2,463,808 after de-

* What the S. E. C. has obviously done, although it nowhere says so in the Findings and Opinion or the schedules attached thereto, is to assume that the bonds of the subsidiary held by American would be subordinated by a court to all other bonds of that subsidiary and to preferred stocks of the subsidiary outstanding in the hands of the public. This is a wholly inadmissible assumption, because no facts justifying any such subordination are even indicated in the Findings and Opinion.

duction for write-ups and depreciation. On December 26, 1944, American sold its common stock in Nebraska Power Company for over $14,000,000 (Holding Company Act Release No. 5517, Dec. 26, 1944), or a total sales value of American's holdings of over $16,000,000 in excess of the minus figure of $2,463,808 used by the S. E. C. in its computation in this case.

In the case of Florida Power & Light Company the S. E. C. (Appendix E-2) arrived at an ultimate deficit in American's holdings in the Florida Company of $609,791, whereas in its order approving the reorganization of the Florida Company it recognized a book equity of American in the Florida Company of $23,615,832 (Commission Order, dated December 28, 1943, Holding Company Act Release No. 4791, December 30, 1943).

In Appendix E-2 the S. E. C. found American's equity in The Montana Power Company to be $8,860,068. Since the order of the S. E. C. in this case, the oil producing and refining properties of Glacier Production Company, a subsidiary of The Montana Power Company, have been sold for over $9,000,000 (Holding Company Act Release No. 5463, December 1, 1944) and by an order dated June 29, 1945, the S. E. C. has recognized the residual value of the common stock and surplus of The Montana Power Company in the amount of $22,614,000 after the elimination of all inflationary items found by the Montana Public Service Commission and the creation of a contingency reserve of $18,000,000 for additional electric plant adjustments found by the Federal Power Commission (in conflict with the Montana Commission) to have been inflationary (Holding Company Act Release No. 5897, June 30, 1945).

Consequently the tabulations which lead to the figure of 4.75% for American's proportion of the total capitaliza-

tion of its subsidiaries are wholly indefensible, and the S. E. C. is thrown back on book values to support its final conclusion as to distribution of voting power. As already shown, that conclusion cannot possibly be supported by book values.

Similarly, in its conclusion regarding "undue and unnecessary complication", the S. E. C. relied primarily on the alleged control Bond and Share is able to exercise, through investments in American and the investments of American in its subsidiaries, which it termed a "pyramiding arrangement" (R., Vol. II, 634). Consequently, these same fallacious value computations were also used by the S. E. C. in arriving at its conclusion with respect to complication of structure.

The Court below failed to grasp the contention of American that the S. E. C. erred in adjusting dollar figures representing values without having any basis for, or making, any true valuation to support the resultant figures. The S. E. C. acted in this proceeding in reliance on dollar figures which were without foundation.

Eliminating then these alleged findings as fundamentally defective (along with the statements of past legal acts), there is left in the Findings and Opinion only a statement of the bare present set-up of American and its subsidiaries in the Bond and Share System, set forth in the introduction to this brief. Such facts cannot form a legal basis for the dissolution of American under the due process clause.

(d) The order rests on statements in the Findings and Opinion regarding values and violates the due process clause, since American was denied a hearing on this issue.

As seen above, the S. E. C. based its findings primarily upon book values which it at the same time rejected as subject to possible adjustments for apparent write-ups and

inconclusive depreciation computations and fortified its conclusion by these adjustments. By this process it reduced American's investment in subsidiaries having a ledger value on the subsidiaries' books of $303,000,000 and an investment on American's books of $250,000,000 to a hypothetical value on account of the assumptions made of approximately $21,000,000 (R., Vol. II, 540, 619, 665, Appendix E-2).

To meet the issues presented by the exhibits resulting in this finding, American made an extensive and detailed offer of proof of the present value of the properties of its subsidiaries, and of the actual depreciation suffered by those properties, and of their earning value (R., Vol. I, 234-262). The substance of this offer was that the total reproduction values, less depreciation, of the subsidiary properties of American, aggregated $741,854,644 (R., Vol. I, 248), and that the portion thereof applicable to the securities owned by American was $315,502,363 (R., Vol. I, 253).* This value plus cash and current assets applied to American's capital structure would satisfy the long-term debt of $45,849,000, preferred stock of $177,145,326, arrearages thereon of $35,114,788, and leave a remainder for common stock of $76,349,806 (R., Vol. I, 253). The available income to American for the years 1937 through 1941, giving effect to the conditions prevailing in December, 1941, but based on Federal income tax rates for 1938 and 1939, would have aggregated $75,026,511, which after all prior charges would

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* The valuations offered by American were conservative. For example, the valuation for the common stock of Nebraska Power Company offered was $11,527,540 (R., Vol. I, 251), whereas such stock has recently been sold for over $14,000,000 (Holding Company Act Release No. 5517, Dec. 26, 1944); and American offered proof of a value for its holdings in Florida Power & Light Company of $22,887,390 (R., Vol. I, 251), whereas the S.E.C. has recognized the book equity of American in that company at $23,615,832 (Holding Company Act Release No. 4791, Dec. 30, 1943).

leave available for common stock for those years a total of $9,873,361 (R., Vol. I, 257-258).

This testimony was rejected by the examiner and his action was sustained by the S. E. C. (R., Vol. II, 532).

There is not here involved any question of rate base valuation or original cost accounting, but solely a question of the fair value of securities. Such values are not predicated on an audit of capital accounts but on a fair appraisal of "enterprise value", giving full consideration to all elements of value, with particular emphasis on the earnings available to satisfy all classes of securities.* It would appear that this testimony was highly relevant to the issues as framed and disposed of by the S. E. C. itself.

American was thus denied a hearing and the opportunity to introduce evidence on one of the main points in the existing situation. It has been uniformly held by this Court that the refusal of a hearing on evidence which is relevant and material to a matter in issue is a violation of the due process clause of the Fifth Amendment or of the Fourteenth Amendment.

Chicago Junction Case, 264 U. S. 258 (1924);
St. Joseph Stock Yards Co. v. *United States*, 298 U. S. 38 (1936);
Ohio Bell Telephone Co. v. *Public Utilities Commission of Ohio*, 301 U. S. 292 (1937);
Morgan v. *United States*, 304 U. S. 1 (1938);
National Labor Relations Board v. *Indiana & Michigan Electric Co.*, 318 U. S. 9 (1943).

* The S.E.C. itself has consistently recognized this principle in its allocation of security values in reorganization proceedings. *In the Matter of Jacksonville Gas Company* (Holding Company Act Release No. 3570, May 28, 1942, at p. 11); *In the Matter of The Middle West Corporation* (Holding Company Act Release No. 3580, June 5, 1942, at p. 30); *In the Matter of Community Power and Light Company* (Holding Company Act Release No. 3676, July 18, 1942, at p. 30).

In *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9 (1943), *supra*, the Court (Mr. Justice Jackson) said (p. 28):

> "But courts which are required upon a limited review to lend their enforcement powers to the Board's orders are granted some discretion to see that the hearings out of which the conclusive findings emanate do not shut off a party's right to produce evidence or conduct cross-examination material to the issue. The statute demands respect for the judgment of the Board as to what the evidence proves. But the court is given discretion to see that before a party's rights are finally foreclosed his case has been fairly heard. Findings cannot be said to have been fairly reached unless material evidence which might impeach, as well as that which will support, its findings, is heard and weighed."

The Court below dealt cavalierly with this point of denial of a fair hearing through exclusion of the petitioner's valuation evidence. Its unique statement in this regard was (R., Vol. IV, 888):

> "We think we should indulge the presumption that the Commission and its lawyers would know enough not to commit the egregious blunder of (1) making a ruling that petitioners could not be allowed to introduce valuation evidence, and (2) in the same document making ultimate findings predicated in part upon subsidiary findings as to valuation. This consideration would weigh with us in resolving any possible ambiguities that might exist in the Commission's findings."

The Court then said (*Id.*) that it did not believe that the Commission's findings rested on subsidiary findings as to present valuation, and also cited the *Commonwealth &*

Southern case, sustaining the exclusion of valuation evidence as irrelevant in that case.*

But, if the order is not based on any statements in the Findings and Opinion relating to valuation, there is nothing left to support the order of dissolution.

Moreover, for example, it would be impossible to reach a conclusion that there was unfair distribution of voting power in the subsidiaries of American as between American and the public holders on the basis of the book figures because the book figures show that American has a 69% interest in the stocks of its subsidiaries, primarily in common stock. Any such conclusion, based upon percentage interest of American, could only be supported by a revaluation, and no such revaluation could properly be made without receiving and considering American's evidence on that issue.

(e) The S. E. C. arbitrarily refused to hold hearings on American's voluntary Plan for reorganization.

As an alternative to the S. E. C.'s proposal of dissolution, American, on July 23, 1941 (over a year prior to the closing of the record), filed a Plan of reorganization which purported to comply with the provisions of the Act with respect to the confinement of operations to a single integrated public utility system, or systems, and to retire its

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* *Commonwealth & Southern Corporation* v. *Securities and Exchange Commission*, 134 F. 2d 747, 754 (C. C. A. 3, 1943) involved an order of the S. E. C. only requiring that preferred and common stock be reclassified into one class of stock without stating the division of the new stock between the two existing classes. The Court said that valuation evidence was not needed until it was time to determine such division and that it was obvious on the face of things that some reclassification as ordered was desirable. We think that the decision was erroneous and that valuation evidence should have been admitted. In any event, the case is clearly distinguishable from the present one where the whole decision of the Commission obviously turns on the relative values of the interests of various groups of security holders.

debt, and reclassify its preferred and common stock into single class of common stock, and filed therewith an applica tion for its approval. This application and the Plan are se forth in full in the record (R., Vol. II, 393-471).

On December 6, 1941, American filed a motion to con solidate its application for approval of its Plan with th pending proceedings before the S. E. C. under Sectio 11(b)(2) of the Act (R., Vol. I, 386-392). The motion t consolidate was deferred, and reserved for final ruling o the S. E. C. (R., Vol. I, 292, 295).

The S. E. C. in its Opinion denied the motion to consoli- date and refused to grant hearings on the Plan in advance of its order of dissolution (R., Vol. II, 533).

The Plan proposed that American would provide for the payment of its debentures and reclassify its stock capital, preferred, including arrearages, and common, into a single class of common capital stock, according to each present class of stock such proportion of the new common stock as should be fair and equitable (R., Vol. II, 416-418).

The Plan did not definitely elect an integrated public utility system to be retained by American. American had within its system several groups of properties which the Plan contended conformed to the statutory definition of integrated systems, viz., the northwestern group of proper- ties in the Pacific northwest, including Oregon, Washington, Idaho and Montana, the Texas system in the State of Texas, the Kansas-Nebraska system in Kansas and Nebraska, the Minnesota-Superior system in Minnesota and Wisconsin, and the single company systems of Florida Power & Light Company and Central Arizona Light and Power Company (R., Vol. II, 422-429). It was proposed that American should retain and continue to operate such of these systems as the S. E. C. might permit, and distribute

the stocks of remaining subsidiaries to the stockholders of the reorganized American Company in proportion to their holdings (R., Vol. II, 420-421). Thus the end result in the case of American would be that upon reorganization it would be a single stock holding company retaining only such integrated system or systems as it might be entitled to hold under the statute.

The S. E. C. refused to consider the Plan as an alternative to dissolution, first, because it found that the Plan would not effectuate the statutory requirements promptly, or perhaps at all, because it would be necessary for the S. E. C. to explore a number of very complex steps before reaching a conclusion and the Plan might never meet the approval of the stockholders (R., Vol. II, 639-641). Second, it found the Plan was incomplete because it did not state how many shares of new capital stock were to be issued or the aggregate par value thereof, or the proportions in which they should be allocated, did not make definite provision for the retirement of outstanding debt, or definitively elect the system which it was to retain. Third, it found the Plan was ineffective in that while it simplified the corporate structure of American, it did not provide for the elimination of Bond and Share from the system, so that if Bond and Share should emerge with blocks of voting securities which would enable it to exercise a controlling influence in the companies, the system would still violate the standards of Section 11(b)(2) of the Act. Finally, the S. E. C. said that the Plan did not propose to breathe functional vitality into American, and it might be better to create new holding companies if such were advisable for any properties that were to be kept together (R., Vol. II, 641-647).

It is difficult to understand these criticisms on any theory other than that the S. E. C. had predetermined in its

order of June 7, 1940 to terminate the existence of American.

The initial objection of delay in effectuating statutory requirements exists equally if not more potently in the order of dissolution as entered by the S. E. C. The S. E. C. in its order stated in effect that American cannot presently dissolve, but the S. E. C. must first solve these same complex problems with respect to the subsidiary companies which American was said to have created.

Concededly, as a finished document, the Plan was incomplete in that it neither stated definitely the capitalization of the reorganized company, nor the distribution thereof among classes of security holders, and failed to specify the integrated system which American would retain. Any statement as to capitalization and distribution thereof could be nothing but *pro forma*. This was a matter which had to be determined by the S. E. C. upon some basis of valuation of the properties and determination of the equities of the different classes of security holders.

American could not elect an integrated system until it knew what systems the S. E. C. would approve as single integrated systems, or how many such systems the S. E. C. would permit it to retain. There had been no definitive decisions by the S. E. C. at the time of filing the Plan on these matters. It was clearly the duty of the S. E. C. under the provisions of the Act to define integrated systems so that it might be determined which systems would be retained. It has had no hesitancy in so doing in other cases.*

Furthermore, it has been the consistent practice of the S. E. C. to permit what might be termed preliminary plans

* See, for example, *In the Matter of Engineers Public Service Company*, Holding Company Act Release No. 3796, Sept. 17, 1942, and *In the Matter of The North American Company*, Holding Company Act Release No. 3405, April 15, 1942.

or proposals of various natures to be filed with detail to be supplied by amendment.* After plans have gone to hearing and been approved in principle by the S. E. C., it has indicated what amendments would be required in the matters of reclassification of stock or otherwise to secure S. E. C. approval.** The suggestion by the S. E. C. that it would have had to commence its proceedings all over every time an amendment or new plan was filed ignored its settled practice.

The objection of the S. E. C. (R., Vol. II, 644) that the Plan did not provide for severance from the Bond and Share System was purely captious. It is obvious that upon reorganization of American, Bond and Share's interest would be so small that no question of control through stock ownership could possibly be presented. This is evidenced by American's proposal to reclassify its preferred and common stock into a single class now pending before the

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* *In the Matter of Ogden Corporation* (Holding Company Act Release No. 4307, May 21, 1943, at p. 27): "The plan does not contain the details for the carrying out of its objectives; instead, it is contemplated that the steps to be taken in fulfilment of such objectives will be supplied by specific plans to be filed by the respective companies involved, or by amendments to the plan before us." See also *In the Matter of The California Oregon Power Company* (Holding Company Act Release No. 3728, Aug. 12, 1942, at p. 10), where the Commission approved the "general program" as outlined in the application and declaration; and *In the Matter of Jacksonville Gas Company* (Holding Company Act Release No. 3959, Dec. 9, 1942), where the S. E. C. reviewed the outline of the mechanics for the final consummation of a plan which had already received its general approval.

** In the following instances the S. E. C., after a hearing indicated that it would approve submitted plans provided that certain changes were made with respect to voting power, the par value of new stock to be issued or other provisions of the plan: *In the Matter of International Utilities Corporation* (Holding Company Act Release No. 4896, Feb. 15, 1944); *In the Matter of Standard Gas and Electric Company* (Holding Company Act Release No. 5070, May 31, 1944); *In the Matter of Community Power and Light Company* (Holding Company Act Release No. 3676, July 18, 1942, and No. 3794, Sept. 19, 1942); *In the Matter of The Laclede Gas Light Company* (Holding Company Act Release No. 5062, May 24, 1944).

S. E. C. in which Bond and Share's interest in the new stock would be approximately 5½% (Holding Company Act Release No. 4695, November 19, 1943). In any event, American is powerless to eject any stockholder, whether controlling or otherwise, from his holdings. This is clearly the function of the S. E. C. (R., Vol. I, 275).*

The final suggestion of the S. E. C. (R., Vol. II, 645) that new holding companies should be organized to serve any holding company purpose strikes one as highly artificial. Whatever may be said for or against the present American Company, it has within its present structure, as the S. E. C. opinion in effect conceded, the capital required to assemble the properties for the retained systems, and at least a skeleton personnel of experienced men familiar by long association with the properties, capable of ready expansion to whatever might be required successfully to operate the properties if divorced from the service organization of Bond and Share. To require the liquidation of this capital and the assembling of a new personnel would seem to be highly inexpedient and to involve unnecessary and substantial losses to security holders.

As illustrative of inconsistency in the S. E. C.'s proposed solution of the problems here presented with those adopted in other cases, reference is made to the opinion and findings of the S. E. C. in *In the Matter of The United Corporation* (Holding Company Act Release No. 4478, August 16, 1943). There, on substantially identical ultimate findings to those made by the S. E. C. here, the S. E. C.

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* This is the remedy proposed by the S. E. C. in the case of Bond and Share's other subholding companies, American Gas and Electric Company and American & Foreign Power Company (Holding Company Act Release No. 4305, May 19, 1943).

adopted the very procedure urged by these petitioners and rejected by the S. E. C.*

The reasons given by the S. E. C. for disregarding the Plan and refusing hearing thereon were arbitrary and specious.

(f) Section 11(b)(2) does not authorize the S. E. C. to direct dissolution of a corporation, an objection which the Court below erred in refusing to consider.

Before arguing the point that the language of Section 11(b)(2) does not authorize the S. E. C. to dissolve any corporation, we will deal with the holding of the Court be-

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* In the following comparison, the first reference is to the page of the S. E. C. Release relating to United Corporation, cited above, and the second is to the Record page containing the parallel finding in the cases at bar:

1. The United Corporation performs no useful function in the holding company system of which it is a part and burdens it with unnecessary expense (Release, pp. 27-28) as American and Electric perform no useful functions and entail unnecessary expense in the Bond and Share system (R., Vol. II, 634).

2. The corporate structure of the United Corporation unduly complicates the system of which it is a part (Release, p. 29; compare R., Vol. II, 624).

3. These complexities have resulted in accumulated arrearages of preferred stock dividends (Release, p. 28, compare R., Vol. II, 630-632).

4. The United Corporation causes an unfair distribution of voting power among security holders of its system (Release, pp. 30, 31; compare R., Vol. II, 622-624).

5. The United Corporation's plan is defective and affords no assurance of prompt and ready compliance with the Holding Company Act (Release, pp. 37, 45; compare R., 647).

6. Appropriate remedy for the United Corporation is dissolution (Release, p. 50; compare R., 636).

Notwithstanding this conclusion, dissolution order was withheld to give the United Corporation an opportunity to comply with the Holding Company Act (Release, p. 50), whereas a similar opportunity was denied to American despite its express contentions, recognized but denied by the S. E. C., that such opportunity should be vouchsafed it before order of dissolution should be entered (R., 647-648).

low that American was not entitled to raise this point in that Court.

(1) The Court below erred in refusing to consider the question of the construction of Section 11(b)(2).

The Court below in holding (R., Vol. IV, 875) that American had no standing to challenge the authority of the S. E. C. to dissolve a corporation under the language of Section 11(b)(2) accepted the S. E. C.'s contention that the objection was not urged before the S. E. C., and that this was required by Section 24(a). The Court was in error in assuming that the point had not been raised below.

In its motion to dismiss the proceeding filed with the S. E. C. September 9, 1940, petitioner did urge the objection by challenging any destruction of American as "beyond the powers of the Commission" and also as in violation of the Fifth Amendment, viz. (R., p. 352):

> "11. The exhibits offered in evidence by Commission counsel show affirmatively that respondents, American Power & Light Company, Electric Power & Light Corporation and National Power & Light Company were lawfully incorporated in accordance with the laws of the states of their incorporation, that the voting power pertaining to the various securities issued by said companies was established and determined in accordance with the laws of the states of incorporation and the charters and by-laws of said companies adopted pursuant to said laws, and that valid, legal contract rights were vested in the various security holders of said companies. *Any destruction or impairment of said contract rights is beyond the powers of the Commission* and would constitute deprivation of the property rights of the holders of said securities, in violation of the Fifth Amendment to the Constitution of the United States." [Italics added]

The petitioner was certainly not required to *argue* the point in detail before the S. E. C., since the S. E. C. had already uniformly held that it did have power to dissolve corporations pursuant to the first sentence of Section 11(b)(2). There were in the language of Section 24(a) of the Act "reasonable grounds for failure so to do". This was implicit in the stipulation accepted by the S. E. C. in closing the case that "all legal and constitutional rights, including [the] right to full judicial review" were reserved (R., Vol. II, 520, 521).

(2) Section 11(b)(2) cannot be construed as authorizing the S. E. C. to dissolve any corporation.

It is clear that the Commission has misconstrued the clause of Section 11(b)(2) of the Act which, for the purpose of this proceeding, is controlling. The statute authorizes the Commission to require system companies to "take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system" does not unduly complicate structure or unfairly distribute voting power. It is *corporate structure or continued existence in the system*, and not corporate existence which may be dealt with by the S. E. C.*

But beyond this, which seems clear, purely as a matter of simple grammatical construction, Section 11(b)(2) has a Congressional history which indicates under the decisions of this Court that Congress did not intend to confer power on the S. E. C. to take the action it has taken here, that is,

* The question of the authority of the S. E. C. to dissolve a corporation pursuant to Section 11(b)(2) was not passed upon by this Court in the recent case before this Court involving only rights of holders of preferred and common stocks in a reorganization under Section 11(b)(2), *Otis & Co.* v. *Securities and Exchange Commission*, 323 U. S. 624 (1945).

to order dissolution of a corporation to remedy defects under the first sentence of Section 11(b)(2). There is not found in the first sentence of Section 11(b)(2) any express authority to dissolve any corporation nor is there any such authority linked to Section 11(b)(2) anywhere else in the Act. It would, therefore, be concluded that authority to dissolve a corporation was not intended to be given to the S. E. C. and was not given. This is confirmed by the Congressional history of the Act.

A purported grant of authority to the S. E. C. to dissolve corporations to accomplish the purposes set forth in Section 11 of the Act was contained in the original bills introduced in the Senate and the House, but was *stricken* from the bill as finally passed by Congress.* This action of Congress disposes of any claim that Section 11(b)(2) authorizes the S. E. C. to decree dissolution of any corporation.

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* The original bills introduced in the Senate and House (S. 1725 and H. R. 5423 (74th Congress, 1st Session), both dated February 6, 1935) were based on studies made by the predecessor administrative body to the S. E. C., the Federal Trade Commission. They provided generally for dissolution of all public utility holding companies. The Senate bill and the House bill were substantially identical. The only difference was that the sections were numbered differently, and the present Section 11 was numbered Section 11 in the Senate bill, but numbered Section 10 in the House bill. The disintegration and reorganization provision of these bills (Section 11 in the Senate bill and Section 10 in the House bill) contained in subsection (a), as in the present subsection (a) of Section 11, provisions for a study of each holding company system by the S. E. C. In subsection (b) there were four subdivisions. Both of these bills contained provisions for divestment of assets (subdivisions (1) and (2)), and permitted the S. E. C. to require dissolution or reorganization of certain corporations in a holding company structure after January 1, 1938 (subdivision (3)) and to compel dissolution of every holding company after January 1, 1940 except those which might obtain a "certificate of necessity" from the Federal Power Commission (subdivision (4)).

The bill which emerged in the Senate from its Committee on May 7, 1935 (S. 2796) was substantially the same as that first introduced in the Senate, except that the original subdivisions (1) and (2) of Section 11(b), both relating to the disposal of assets,

The S. E. C. in its Findings and Opinion points to Section 1(c) of the Act as though that indicated an intention to confer power to dissolve corporations. This clause states that one purpose of Congress was "to provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided in this title." But this statement cannot be construed to sustain the power to *dissolve* corporations, particularly in the face of Congressional action removing authority to dissolve from Section 11(b)(2). There is no reference in the clause just quoted to dissolution of any corporation but simply to "elimination" of holding companies, "except as otherwise expressly provided." The meaning of "to

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had become subdivision (1) of subsection (b) of Section 11. Subdivision (2) of the Senate Committee bill was the provision permitting the S. E. C. to require dissolution of a corporation for purposes of simplification (to which the Senate Committee had added the phrase about distribution of voting power), and subdivision (3) was the provision authorizing the S. E. C. to compel dissolution of every holding company after January 1, 1940. The Senate passed the Senate Committee version of the bill on June 11, 1935.

The House Committee to which the bill introduced into the House was sent objected to the provisions authorizing the S. E. C. to compel the dissolution of corporations in a holding company structure, and the bill which was reported to the House by the Committee on June 24, 1935 contained in its disintegration and reorganization section (now finally numbered "11") only subsection (a) providing for study of holding company systems by the S. E. C., and subsection (b)(1) providing for divestment of assets to accomplish economic integration.

What the House then did was to act on, and reject, the Senate bill. It voted, on July 2, 1935, to amend the Senate bill by striking out its entire contents and to substitute therefor the provisions recommended by the House Committee. The bill passed by the Senate and the bill passed by the House went to a conference committee and there emerged a bill in both branches of Congress which became the Public Utility Holding Company Act, signed by the President August 26, 1935. This bill removed, from subsection (b) of Section 11, subdivision (3) of the original bill passed by the Senate the authorization to the S. E. C. to compel dissolution of holding companies in a public utility company holding system after January 1, 1940, and removed, from subdivision (2) of Section 11(b), any grant of authority to the S. E. C. to dissolve any corporation.

eliminate" is not "to destroy" but is "to thrust out," "to remove and get rid of by disengaging from environment or associations" (Webster's International Dictionary, Second Edition). A holding company can be eliminated by making it divest itself of stock in its subsidiary holding company or operating company or making it give up its vote on such stock, as, for example, Bond and Share could be required to give up its stock in American or its vote on such stock. There are many ways in which holding companies can be eliminated from a system without dissolution and destruction. Futhermore, as already pointed out in Point II, the S. E. C. has conceded that Section 1 of the Act is not in itself operative.

In any event, the action of Congress in striking out express authority to dissolve corporations from Section 11(b)(2) before passage of the Act, is controlling. Even if there were ambiguity in Section 1(c) such provision could not be deemed to authorize dissolution in the face of such excision. The decisions of this Court are clear that if a provision in a bill is omitted at the insistence of one of the houses of Congress, and the bill is ultimately passed without the provision, other provisions of the bill cannot be deemed to include the substance of the omitted provision.

Pennsylvania Railroad Co. v. *International Coal Mining Co.*, 230 U. S. 184 (1913);
Carey v. *Donohue*, 240 U. S. 430 (1916);
Helvering v. *Wood*, 309 U. S. 344, 348 (1940).

We have not attempted to burden the Court with a discussion of any statements of individual members of either House or of Committees about the bills because, as this Court said in *Pennsylvania Railroad Co.* v. *International Coal Mining Co., supra* (230 U. S., pp. 198-199), such

statements are of no force and effect as against the clear intendment of Congressional action in eliminating a provision from a bill in the passage of an act.

There is certainly no indication from the history of the Act that the striking out of the express provisions for "dissolution" and the substitution of the present language of the Act was meaningless. The provision for dissolution was the focal point of objection in the House to the bill, and the House consented to the passage of the bill only after the elimination of that provision.

Looking at the companion provision, Section 11(b)(1), it would appear that it was not the intention of Congress to authorize the S. E. C. to dissolve any holding company. Section 11(b)(1) provides for integration, indicating that a holding company is to be authorized to continue to exist and to retain at least one integrated system. It is certainly inconsistent with this other subdivision of Section 11 to read into Section 11(b)(2) an intention to dissolve any holding company.

It would, therefore, seem plain that Congress did not intend to authorize the S. E. C. to enter a dissolution order such as was entered here to remedy alleged defects under the first sentence of Section 11(b)(2).

(g) Dissolution of American is an unreasonable, arbitrary and oppressive means of remedying alleged defects in the Bond and Share System.

In view of the absence of any guide in the Section and of its Congressional history and also in view of the failure of the S. E. C. itself to develop or announce any standard for determining the presence of "unfair or inequitable distribution of voting power" or "undue or unnecessary complication of structure" in the Bond and Share System, it would be assumed that the S. E. C. would have proceeded

with the utmost care and regard for the property rights of the public security holders of American. As this Court said in *Otis & Co.* v. *Securities and Exchange Commission*, 323 U. S. 624, 636-637, 638 (1945):

> "Of course, Congress would wish, in simplifying a holding company system capital structure, to preserve values to investors, not to destroy them."

and, again,

> "We must assume that Congress intended to exercise its power with the least possible harm to citizens."

In such a situation the S. E. C. should have selected a course of action the most reasonably and logically connected with some feature of the structure expressly found by it to be within the controlling phrases of the Section and the least oppressive and harmful to petitioner and its security holders. In these circumstances the means selected should certainly have a real and substantial relation to the object sought to be attained.*

The sole issue in the proceeding before the S. E. C. in accordance with the May 9, 1940 order of the S. E. C. was whether there was any "unfair or inequitable distribution of voting power" or "undue or unnecessary complication

* There is every indication that the S. E. C. had prejudged the action it was going to take. Even before American filed an answer, and, before the hearings commenced, the S. E. C. entered an order June 7, 1940, limiting the proceeding to the issue "whether it is necessary to discontinue the existence of American * * * in order to insure that the structure of the holding company system of Electric Bond and Share Company shall not be unduly or unnecessarily complicated and that voting power shall not be unfairly or inequitably distributed among security holders of that system * * *" (R., Vol. I, 65-6), thus eliminating in advance of hearing the various alternative steps which might have been ordered.

of structure'' in the *Bond and Share System.* American is only in the Bond and Share System because Bond and Share owns 4½% in book value of its stock.* If Bond and Share did not hold this comparatively minor percentage of the common and preferred stocks of American, American would not be in the Bond and Share System and could not be claimed to cause any unfair or inequitable distribution of voting power or undue or unnecessary complication of structure therein.

It is clear that the dissolution of American and the destruction of its property and that of its public security holders is an unreasonable, arbitrary and oppressive means of remedying some unspecified defect in the Bond and Share System, when there was a more simple and directly-related means with no such attendant injury.

Such a means is particularly oppressive in view of the stress laid by the S. E. C. in its Findings and Opinion on the alleged abuses by Bond and Share prior to the enactment of the Act, of which the public security holders of American were the victims. There is no reasonable explanation whatsoever why the S. E. C. did not take the simple and virtually harmless course of ordering Bond and Share not to vote its comparatively small stock interest in American (4½%), or to trustee such stock with individuals selected by the S. E. C., or to dispose of such stock. In the language of this Court in *Regal Knitwear Co. v. National Labor Relations Board,* 324 U. S. 9, 13 (1945), (Mr. Justice Jackson), ''the infirmity is inadequacy of findings to show appropriateness of the choice made.''

The complete lack of basis for the S. E. C. claim that American must be dissolved to simplify the Bond and Share

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*It should be pointed out that no such situation obtains between American and its subsidiaries; American owns substantially 100% of the common stock of each of its subsidiaries.

System was demonstrated when the S. E. C., in the year after the order for dissolution of American was entered, commenced a proceeding, now pending, to break up the balance of the Bond and Share System (Holding Company Act Release No. 4305, May 19, 1943). In the proceeding mentioned, the issue was stated by the S. E. C. to be whether Bond and Share should be compelled to divest itself of its holdings in its two remaining holding company subsidiaries, American Gas and Electric Company and American & Foreign Power Company, Inc. It cannot possibly be reasonable to dissolve American in order to simplify a system which in any event is not to be preserved.

Moreover Bond and Share has recently itself commenced a proceeding before the S. E. C. to divest itself of its holdings in American (Holding Company Act Release No. 5970, August 6, 1945). How can the S. E. C. then claim that American must be dissolved to simplify a system which is proceeding forthwith, and irrespective of the dissolution order, to eliminate American therefrom?

The arbitrary and unreasonable action of the S. E. C. in ordering dissolution of American was clearly a violation of the due process clause of the Fifth Amendment.

Conclusion.

The statute does not represent an exercise of a Federal power, it violates the constitutional limitations on the taking of property without compensation, and it contains an oppressive grant of legislative power in violation of the due process clause.

The order and the proceeding on which it is based were also unauthorized, oppressive and violative of the due process clause.

The orders of the S. E. C. appealed from should be set aside in all respects.

Respectfully submitted,

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October 15, 1945.

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Supreme Court of the United States

OCTOBER TERM, 1945

No. 69

AMERICAN POWER & LIGHT COMPANY,
Petitioner,

against

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

REPLY BRIEF FOR PETITIONER.

It is respectfully urged that the brief for the Government does not meet the constitutional and other difficulties with the statute and order pointed out in our main brief. What bulks large in the Government brief is a statement of evils sought to be remedied by the Public Utility Holding Company Act, and the assertion of the existence of some of them in the Electric Bond and Share system. The question presented here, however, is not of these evils but rather of the constitutional and legal status of the novel remedy sought to be applied under the Act.

The points in the brief for the Government are:

I. The Commission properly found that the corporate structure and existence of Petitioner unduly and unnecessarily complicate the structure of the Electric Bond and Share holding company system and unfairly and inequitably distribute voting power among the security holders of that system..... 35

II. In the light of the Commission's findings, the remedy of dissolution is proper 94

III. Section 11 (b) (2) of the Act is constitutional 140

In opposition the following is submitted:

I.

The "Findings and Opinion" of the Commission do not afford a substantial basis for a conclusion that the structure and existence of American inequitably distribute voting power among the security holders of its own system or unduly or unnecessarily complicate its own system.

As appears from the statement of the first proposition of the Government, and indeed from the substance of the entire brief of the Government, the attempted justification of the order of the Commission directing dissolution of Petitioner (American) is based upon the effect of American in the *Bond and Share* holding company system. Most of the lengthy factual statement and discussion in the brief is directed to criticism of Bond and Share and its past acts, and to urging the inconsistency of the Bond and Share set-up with the objectives of the Act.

In its appeal, which is now here, American makes the basic complaint that its own structure and right to exist should be passed upon, not viewing American simply as part of the Bond and Share system, from which American could readily be divorced, but as the key unit in its own holding company system. Section 11 of the Act contemplates that the Commission shall deal with "each" and "every" system.

Preliminary.

In the Government brief it is asserted at the outset and elsewhere that American accepts the Findings and Opinion of the Commission as "an agreed statement of facts" which American is not free to contest (Br., pp. 3, 21, 23, 35).

The fact is that in the interest of bringing to a close the proceedings before the Commission, which had lasted for more than two years, American merely waived further argument on the report submitted by the Commission, a large part of the report consisting not of facts or "findings" but of inference and argument.

That the Government's contention is completely without basis is shown by the Record and by the Commission's own statement. The stipulation between counsel for American and counsel for the Commission provided in part that American reserved "all legal and constitutional rights, including its right to full judicial review of the said findings, opinion and order" (R., Vol. II, 521). The Findings and Opinion of the Commission state, with reference to this stipulation, that it "recites that Respondents *do not acquiesce in the present findings and conclusion or in the order to be entered hereon,* and that they expressly reserve all legal and constitutional rights" (R., Vol. II, 528).*

Acquiescence by American in expediting the proceedings has no bearing upon this appeal, nor does the statement by American to its stockholders, not appearing in the Record, although stressed by the Government, that American did not then intend to appeal.

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* Italics within quoted matter have been supplied throughout this brief except as otherwise noted.

The Issue Framed by the Commission: Bond and Share.

Consideration of the Findings and Opinion and their treatment in the Government brief shows that dissolution of American was in fact ordered because of the alleged effect of American in the Bond and Share system.

The proceedings resulting in the order, entered August 22, 1942, were instituted by the Commission May 9, 1940, by notice and order entitled (R., Vol. 1, 27):

> *"In the Matter of Electric Bond and Share Company, American Power & Light Company"*—and other subsidiaries of Bond and Share.

By an order dated June 7, 1940, with reference to hearings in the proceeding, the Commission provided (R., Vol. 1, 66):

> "that such hearing shall be limited initially to the issue of *whether it is necessary to discontinue the existence of American Power & Light Company, Electric Power & Light Company * * * or any of them, in order to insure that the structure of the holding company system of Electric Bond and Share Company* shall not be unduly or unnecessarily complicated and that voting power shall not be unfairly or inequitably distributed among security holders of such system."

It was on the issue as so limited that the hearings were held before the Commission, the evidence taken and the Findings and Opinion and decree rendered.

The Government brief (pp. 17-18) calls attention to the fact that the order above quoted states that the hearings shall be so limited "initially". Notwithstanding this, the Record, as well as the Government brief, shows that the substance of the hearings never got beyond the issue as "limited initially". The decree of the Commission of course purported to dispose of American finally.

American: A Holding Company System by Itself.

What is completely minimized in the Government brief, as it was by the Commission, is that American is in itself a holding company system. American owns substantially all the common stock of sixteen subsidiary operating electric and gas utility companies, serving a population of 2,740,000 (R., Vol. II, 541-542). Some of these companies operate in only one state and the operations of others extend into two states.

American is a large company, with a capital of some $270,000,000, including approximately $46,000,000 of debentures and $177,000,000 of preferred stock, and some 3,000,000 shares of common stock, carried on its books, with surplus, at more than $47,000,000 (R., Vol. II, 537). American stands as an investment medium of some 45,000 public investors (R., Vol. II, 537; Tr. 1968); all its debentures, and 95½% of its stock are owned by the general public (R., Vol. II, 537-538). The utility companies whose common stock American holds in turn have outstanding approximately $311,000,000 of bonds and $110,000,000 of preferred stock, all held by the general public, except $4,700,000 of that preferred stock and some bonds held by American (R., Vol. II, 539-40; pp. 1, 3 of Ex. D to 1941 Form U5S of American; R., Vol. I, 262; R., Vol. II, 659, App. B-2).*

Bond and Share owns some preferred shares (51,840) and 937,221 common shares of American. This is less than 4½% of American's stock at book value. The Bond and Share holding carries 20.7% of the vote in American (R., Vol. II, 537-538).

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* The figures used above are those of December 31, 1941, the last year considered by the Commission, as set forth in the Findings and Opinion of the Commission.

This 4½% holding in American's stock, carrying over 10% of the vote, of course makes American and its subsidiaries a part of the Bond and Share system by statutory definition (Section 2(a)7-9 of the Act).

That fact, however, should by no means obscure the most pertinent consideration that American is an entity in itself. It has cumulative dividends in arrears, but stands as an eminently solvent and self-sustaining enterprise.

The Government states throughout, as did the Commission, that American is solely "an instrumentality for Bond and Share", for purposes of furnishing Bond and Share control over the subsidiaries of American (Govt. Br., pp. 9, 26, 73).

Yet at the same time the Government asserts that Bond and Share owns but a small fraction of the ultimate equity in American; that the bulk of the stock in American, all of its debt, and all the securities of the underlying companies, except their common stock, and some preferred stock and bonds owned by American, are owned by the public (Govt. Br., pp. 5, 41-43).

It by no means appears from the Findings and Opinion that American has no independent place and function in itself. The Government asserts that American was used "as a means of obtaining funds from the public" (Br., p. 9), yet maintains that American is to be dealt with not from the standpoint of the public so predominantly owning its securities, but from the standpoint of Bond and Share.

The Government statement as to the annual expenses of American, however, requires correction. The Government states (Br., p. 80), that the expenses of American in 1941 exceeded $1,000,000, citing page 634 of the Record. That page contains a statement by the Commission indicating such figure. When carefully examined, however, the Record shows that the expenses of American for 1941, including

taxes, were $764,480 (Annual Report to Stockholders for 1941, p. 10, Ex. F-1 to 1941 Form U5S of American). Taxes amounted to $366,778, which left the total expenses of American, excluding taxes, at $397,702. The tax item thus should not have been added to the expense total, as it was by the Commission and by the Government.

As against this expense, American cites the fact that through the combined holdings of the subsidiaries American effects savings in dividend payments amounting to probably $300,000 a year, savings in stock transfer taxes (which the Government omits to mention), and, through consolidated returns, net savings in taxes (Main Br., pp. 24, 83-84). While the Government objects to consideration of these tax savings (Br., p. 80), they have a natural bearing upon the interests of the security holders of American.

On the facts set forth in the Findings and Opinion, American contends that, although created by Bond and Share for Bond and Share's own purposes, American stands as a distinct holding company system, with 95½% of its stock in the hands of the public. Under the Act, American was accordingly entitled to its own day in court and was not properly disposed of by the Commission as a mere adjunct of Bond and Share.

All objection to *American in the Bond and Share system* through its 4½% of American's stock would be corrected by divestment by Bond and Share of its stock in American, a matter discussed below.

With regard to the Bond and Share aspect, it should be remarked also that the Record shows that while Bond and Share has 20.7% of the voting power in American, the public has 79.3%. It appears from the Record that in the last six years (1935-41) in stockholders' meetings of American, Bond and Share actually cast but 37% of the votes while the public stockholders cast 63% (R., Vol. II, 617).

There is thus no basis whatever for the insistence in the brief of the Government (*e.g.*, p. 25) that the public stockholders in American are "*disfranchised*". The public not only had, but actually exercised, dominant voting control over American. What the Commission complains of is not the voting *power* of the public, but the *voting attitude* of the public—a very different matter.

As directed to American, the Findings and Opinion are far from affording a substantial basis for a conclusion that in American voting power is unfairly or inequitably distributed, and that its own system is unduly or unnecessarily complicated.

As to the distribution of voting power between *stockholders of American*: the preferred stock always has a share for share vote (R., Vol. II, 537). The common stock of American has about 63% of the voting power in American (*id.*).

Statements made by the Commission (*e.g.*, R., Vol. II, 568) imply that the preferred stockholders should have a larger or preponderating vote, while dividends on that stock are in arrears.

There is no evidence that the preferred stockholders complained about this; indeed, the Record shows that a greater percentage of preferred stockholders than of common stockholders voted, and that they have voted regularly in favor of the present management (S. E. C. Exs. 49 and 49A; R., Vol. I, 201; Tr. 18156).

No standard of voting power would call for *destroying* the voting power of the preferred stock along with that of the common, because it was conceived that the preferred stock might have too little voting power.

As to voting power of American over its own subsidiaries, American owns substantially 100% of the common

stock of each of its subsidiaries (R., Vol. II, 541). American holds a small amount of the outstanding preferred stocks of some of its subsidiaries ($4,700,000 out of a total of $110,000,000; see p. 5, *supra*). Its common stock ownership in the subsidiaries carries with it, generally speaking, over 90% of the voting power in the subsidiaries (R., Vol. II, 541).

Taking into consideration both the preferred stocks and the common stocks of the subsidiaries and using book figures (as of December 31, 1941, the end of the last year prior to the closing of the hearings), American owns over $254,000,000 of the stocks, or over *69%* of the total stock equity in its subsidiaries (Main Br., p. 89). This financial interest of American in its subsidiaries, amounting to 69% and substantially all in common stocks, is such as amply to support American's having voting control over its subsidiaries.

As pointed out in our main brief (pp. 88-97), the Commission sought to reduce the financial interest of American in its subsidiaries to show that the financial interest was "attenuated" and disproportionate to its voting control. It was after setting forth such reducing computations that the Commission stated:

> "*On the basis of the foregoing figures,* it is apparent we must find that voting power is unfairly and inequitably distributed *among the security holders of the American system, and among the security holders of the American-Bond and Share system*: and that accordingly the continued existence and capital structure of American unfairly and inequitably distribute voting power among security holders of the Bond and Share system" (R., Vol. II, 622).

The "foregoing figures" included figures which were not findings at all and also, as we maintain, fallacious com-

putations. This objection the Government now attempts to meet by stating that the Commission also included *book* figures as to which there was no dispute, and that the Opinion is to be treated as laying "greatest emphasis" on the book figures rather than on the computations considered, but not found (Govt. Br., pp. 47-48).

The Commission first introduced into these computations *bonds* of the subsidiaries. The suggested adjustment increased the amount of the total property interest to be considered by the amount of the bonds of the subsidiaries and reduced the percentage *property* interest of American in its subsidiaries, represented by stocks, from the apparent 69% to 41.67% (R., Vol. II, 619). We maintain that bonds do not ordinarily carry a vote, even in the current practice of the Commission. Their inclusion in estimating the interest of American, on which its vote is predicated, was erroneous.

Beyond this, the Commission attacked the book figures for the stock equity, seeking to show that these figures were excessive by reason of apparent write-ups and failure to make adequate provision for depreciation reserves. Such reductions carried the stock equity of American in its subsidiaries down to about $21,000,000, equivalent to 4.75% of the total property interest, including the bonds (R., Vol. II, 619-620, 665, App. E-2). In our main brief (pp. 89-95) we of course pointed out that the Commission made no *findings* regarding these values or as to such reductions. To our objection to the computations on which the Commission's conclusion was based, the Government's answer (Br., pp. 46-50) is that the Commission did not really consider these computations but acted on the basis of the book figures. That stands as pure assumption on the part of Government's counsel.

As to the question of *values* presented by the Commission's attack upon the equity of American in its subsidiaries, American made an extensive *offer of proof* (Main Br., pp. 97-101), the purpose of the evidence being to establish that actual values were as much as the book values. To our objection that this proof should have been received, the answer of counsel (Br., pp. 63-65) is that proof of values is material only when it comes to considering a plan for dissolution by distribution of securities, but is not material when it comes to ordering dissolution on the basis that the financial interest is not sufficient to warrant the voting power. It seems obvious, however, that the question of what the actual value is is highly pertinent in determining the propriety of voting power. This is clearly true unless the Government bases its objection to the distribution of voting power in American on past transactions by which voting power in American was established. But if Section 11(b)(2) is thus to be treated, it is invalid as an *ex post facto* law (Main Br., 85-88).

The Government (Br., p. 40) places reliance on the phrase "unsound asset values having no fair relation to the sums invested in or the earning capacity of the properties", appearing in Section 1(b)(1) of the Act. Yet there is no indication that "asset values" as there used carries any meaning other than the ordinary meaning of asset values at the time when they are to be considered.

American in its main brief (pp. 95-96) pointed out that later events, reported in public documents from the Commission, indicate that the valuations, which in its computations the Commission had assigned to certain different items in American's holdings, show that the Commission's suggested values were out of line with the facts. In the Government brief it is maintained that the differences are

not material and amount only to not making the allowances for additional *depreciation* which the Commission had originally suggested (Br., pp. 51-53).

In the case of the Florida Power & Light Company, one of the three instances dealt with in this connection in our main brief, the Government points out that the amount of write-ups assumed in the Findings and Opinion was $36,883,684, whereas the amount for write-ups ordered by the Commission to be disposed of or reserved for in later proceedings was $31,433,494; and that in the case of The Montana Power Company the amount indicated in the Findings and Opinion was $57,000,000, whereas the amount ultimately ordered by the Commission to be disposed of or reserved for in later proceedings for "write-ups" was $46,891,597 (Govt. Br., p. 60). These differences are not to be treated as inconsiderable.

In addition, however, it appears that the Commission in the later proceedings did not insist upon taking into account the *additional depreciation reserves* which had been suggested in the Findings. The amount of such reserves which the Commission had hypothetically referred to in the Findings and Opinion was nearly $100,000,000 (R., Vol. II, 665, App. E-2, Col. (11)). It follows that if such additional reserves are not to be taken into account, the write-down suggested in the Findings and Opinion was excessive by that amount.

In the case of the Nebraska Power Company stock disposed of by American on December 26, 1944 for $14,000,000, it remains true that the Commission showed for that property a minus figure of $2,463,808. The Government does not dispose of this difference by stating (Br., pp. 59, 62) that the Commission did not pass upon the sale price of this stock.

As appears from what is discussed above and in our main brief (pp. 88-97), the Commission proceeded, at least in part, on the basis of hypothetical and fallacious figures so far as it determined that voting power "among the security holders of the American system" is unfairly and inequitably distributed. The order must therefore be reversed on this ground alone, even if it is possible that the Commission would have reached the same conclusion on other grounds. See *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 294 U. S. 499, 510 (1935); *Securities and Exchange Commission* v. *Chenery Corporation*, 318 U. S. 80, 95 (1943); *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U. S. 515, 532-535 (1945).

As to complication in American's structure in and of itself, the Government brief indicates little substance for the conclusion of the Commission.

The security structure of American is a familiar one, with debentures, preferred stock and common stock. The preferred stock is in arrears (R., Vol. II, 537), but that in itself is hardly a complication. Certainly, it is not one that cannot be cured by familiar corporate steps.

The argument of the Government (Br., p. 70) is focused on the contention that American has no "useful economic function", and that this in itself makes American an unnecessary complication. The Government urges, as did the Commission, that American does not "service" its subsidiaries; that its subsidiaries have executive staffs of their own and could call on the servicing facilities of Ebasco for outside help (Govt. Br., pp. 84-85). One might infer from the Act that the fact that a holding company does not "service" its subsidiaries is a virtue rather than a defect.

What the Government says in its brief about contributions of cash or securities by American to its subsidiaries with the result of improving their "stock equities" (pp. 110-114) indicates the importance of American to its subsidiaries and its stockholders.

American is by no means to be judged useless because of what it *does not do*. American is in itself an investment trust, holding diversified investments in public utility companies, affording stockholders the opportunity for convenient diversification and the means of substantial economies in reference to their diversified holdings. While American does not "service" subsidiaries, it obviously supervises investments.

American has a Board of Directors, including representatives of large public holdings of its preferred stock (Annual Report of American for 1941, Ex. 2 to Form U5S for 1941; R., Vol. I, 269, 281); it has a staff adequate to watch over its investments, to choose local managements through ownership of the voting stock of its subsidiaries, to determine whether the local managements are satisfactory.

In the matter of *complication*, the Government (Br., pp. 70-73) falls back on the effect of American in the Bond and Share system on voting control, a matter which of course would be cured by divestment.

The Government argues (Br., p. 79) that complication exists because a stockholder in a public utility holding company to appraise his stock must inform himself as to the underlying stocks owned by the holding company. Yet this consideration applies with no more force to a public utility holding company than to the general run of investment trusts. These of course are regulated under the Investment Company Act and are by no means prohibited.

II.

The Government brief does not show that dissolution of American was the proper or justifiable remedy to accomplish the purposes of the Act.

Apart from the attacks on Bond and Share, the weight of what is said in the Government brief is directed to the argument that in the situation of American, conceived by the Commission to be a mere "instrumentality" or "tool" of Bond and Share, "The Commission's choice of dissolution was an eminently fair and practical solution to a complex administrative problem" (Br., p. 28).

That this should be elaborately argued by the Government is natural as it is so obvious that the apposite remedy was simply to order that Bond and Share divest itself of its holding of the 4½% of American's stock, or have the stock trusteed for voting, or withheld from voting. As to the possible use of the remedy of divestment, the Findings and Opinion are completely silent (R., Vol. II, 635-636). The Commission had apparently confined its thought to the remedy of dissolution.

American of course contends that before resorting to the radical step of dissolution, the plan of reorganization submitted to the Commission in the course of the proceedings should have been considered by the Commission (Main Br., pp. 101-107). Nothing in the Government brief on that point tends to show that refusal to consider the plan avoided the necessity of consideration by the Commission of the matters ultimately involved in the plan. The steps there involved have as much bearing in dissolution as in reorganization.

It is the position of the Government (Br., p. 95) that the choice of remedy comes down merely to a question of "administrative competence."

However, the choice of remedy was not a mere matter of convenience for the Commission. It vitally affects substantial rights. The remedy selected by the Commission visits all the weight of correction on American and its security holders, not on Bond and Share. Familiar considerations require that the remedy chosen be such as to cause the minimum of damage.

As this Court recently said:

> "We must assume that Congress intended to exercise its power with the least possible harm to citizens" (*Otis & Co.* v. *Securities and Exchange Commission,* 323 U. S. 624, 638 (1945)).

The Government makes the argument (Br., pp. 124-127), not advanced by the Commission, that divestment by Bond and Share would have been *impracticable* because (1) Bond and Share, without revamping its capitalization, might not be able to distribute the stock of American to its own stockholders, and (2) the stock of American might not be in form to distribute until internal changes in American had been effected.

Yet it is clear that before finishing with Bond and Share under the Act, the Commission would have to deal with ordering of the affairs of that company. Indeed the Commission has commenced a proceeding, now pending, to break up the balance of the Bond and Share system (Holding Company Act Release No. 4305, May 19, 1943). And Bond and Share has itself commenced a proceeding before the Commission to divest itself of its holdings in its two remaining subsidiaries (Holding Company Act Release No. 5970, August 6, 1945).

It also appears from what is said in the Government brief (pp. 106-109) that before American could be finally dissolved on the Commission's order, internal adjustments within the American system and in its capital structure would have to be made.

It might appear from statements made from time to time in the Government brief (pp. 32, 120-122, 140) that American is far along the road to dissolution. When the various steps referred to, which were taken by American in the interests of its security holders, are considered, it still appears that the large majority of its holdings remain, some of them in revised form.

No reason appears why all the steps necessary to put the companies in shape for final action could not be taken before the action was had. The difficulties which the Government suggests in divestment by Bond and Share are no greater than the difficulties with the remedy of dissolution. The mandate of the Commission under the Act was simply to proceed "as soon as practicable", exercising its power with a view to the least possible harm. The Commission could have postponed divestment by Bond and Share until the time when it was thought appropriate, and have provided that in the intermediate period Bond and Share should not vote its stocks in American, thus putting an end to the voting power of Bond and Share in American.

No Power of Dissolution.

The Government does not meet the argument that the statute does not authorize dissolution.

It is clear that Section 11(b)(2) does not do so in terms (Main Br., 109-113). The Court below refused to consider this lack of authority on the ground that it was not raised before the Commission (R., Vol. IV, 875). Counsel for the Gov-

ernment do not make this contention seriously in their brief. They say (p. 154) only that the motion paper we quote in our main brief (p. 108) was in "vague and general language", and that we did not give it the full treatment we gave other points. We were not required by Section 24(a) to make a detailed argument to preserve the point.*

The Government brief maintains that the deletion of the word "dissolution" in Section 11(b)(2) in the course of the enactment of the statute was merely intended to leave the remedy discretionary with the Commission. It attempts to overcome the compelling inference from the deliberate deletion of a provision for "dissolution"—the focal point of the objections of the House—by reference to speeches of members of the House, grammatical interpretations of the general language of the Section, references to Section 1, and citations of decisions of the Commission holding that it has power to dissolve (Govt. Br., pp. 156-165).

This Court has long held that statements of Congressmen have no weight in construing an Act, against the implication from Congressional actions (Main Br., pp. 112-113).

Grammatical discussion of the general language of the Act, not mentioning dissolution, does not overcome deliberate deletion by Congress of the specific word "dissolution".

As stated in our main brief (p. 54, footnote; p. 112) Section 1 has been conceded by the Commission not to be operative to limit Section 11.

Certainly the Commission's assumption of power of dissolution is not determinative on this point. An administra-

* References of Government counsel (p. 156) to descriptions of Section 11(b)(2), in briefs in other cases to which American has been a party, as a "death sentence" and as requiring dissolution are beside the point. These characterizations were obviously of the Section as construed by its proponents.

tive agency cannot take a drastic power to itself by its own decisions over the plain intent of Congress. As this Court said in *Addison* v. *Holly Hill Co.*, 322 U. S. 607, 616 (1944):

> "The determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested."

The Government does not meet the argument that the Court below was in error in failing to consider this objection. If it could be assumed that the objection was not made by American to the Commission in sufficient detail, nevertheless it appears that there were "reasonable grounds for failure so to do" within the provision of Section 24(a) of the Act, and the stipulated reservation of all legal and constitutional rights expressly accepted by the Commission obviated the necessity of more detailed objection. The reason was, as the Government concedes, that the Commission had already assumed to exercise power of dissolution. Certainly there is nothing to indicate that the Commission would have reversed itself had the Commission been called upon by American, as the Government now suggests, to re-examine the question (Govt. Br., pp. 154-155).

III.

The Government does not meet the argument that Section 11(b)(2) is unconstitutional.

This section, providing for divestment and simplification in structure, is a wholly novel provision and presents new constitutional issues. In the Act Congress fully provided for *regulation* of all future activities of public utility holding companies. The sections of the Act providing for detailed regulation, which do not appear in the Govern-

ment's brief, are Sections 6-10, 12, 13 and 15 of Title I, and Title II. The added remedy, looking to the taking apart of structures lawfully put together, entered new territory. And the path into that territory was not laid out in the statute.

(A) The difficulties with the Act under the Interstate Commerce provision are not met by the Government brief.

What those difficulties are is set forth in our main brief (pp. 45-60); Section 11 is not expressed in the statute as applying or limited to interstate commerce; no findings by the Commission that such commerce is affected by the existence or structure of American were made or required by the Act.

A reading of the Act as a whole suggests that the underlying theory was that once a holding company was registered under the Act, all provisions of the Act could be applied to it, but in the *Bond and Share* case, 303 U. S. 419 (1938), in accordance with the argument of the Government, the Court expressly held that the registration provisions were separable, leaving the other provisions to be considered on their merits.

What the Government appears to rely upon in the brief (p. 141) is that American is itself a "typical interstate holding company". The question, however, is not as to what American is, but as to what the Act does. The failure of the Act to specify that its application should be to practices or states of facts deemed to affect interstate commerce is not saved by the "separability clause" (Section 32). There was no finding by the Commission that the existence of American affects interstate commerce.

(B) The Government does not show that dissolution is not a taking or that the taking does not involve damage.

The basis of this we have shown in our main brief (pp. 24-40). The Government can hardly be said to argue that dissolution of a corporation does not involve a taking. What is involved in dissolution is not to be minimized by describing the operation as the mere "peeling off of a corporate shell" (Govt. Br., p. 105). Nor does the Government meet the constitutional difficulty as to the absence of provision for giving security holders the right to notice and a hearing, which is involved here (Main Br., pp. 40-43). The Government does not meet the argument that the principle of the *Radford* decision is here controlling.

The argument of the Government in the brief is that the taking involved in the dissolution of American will not cause any damage to the corporation or to its security holders—who have not been given the right to notice and a hearing—and will in fact benefit them. An article from a financial journal is quoted (Br., pp. 146-147), maintaining that when the affairs of holding companies are settled and securities distributed, security holders will find that they will have in value an amount greater than the value of the holding company securities.

This prediction is hardly an argument. It obviously rests upon the consideration, as stated in the journal cited, that holding company securities are "in bad repute"—due in no small measure to the Act. It is obvious from facts and common knowledge that the change in valuation of these securities and underlying securities results in large measure from recent economic and market trends.

The issue as to damages presented here is entirely different from the issue presented by the assertion, in an action

of contract, of the right of a holder of bonds of the United States to be paid in gold, instead of in currency as provided in the bonds, after the use of gold coin had been lawfully restrained, the resulting situation of the currency being such that the bondholder had not proved loss by the change in the medium of payment (*Perry v. United States*, 294 U. S. 330 (1935)).

The controlling point here is that the proposition that a corporation can be forcibly dissolved without damage to itself or to its security holders is not a proposition of law. It is a proposition of fact. On this the corporation and its security holders were certainly entitled to a hearing and determination. No such proceeding is provided for by the Act. To hold that they were not so entitled would be "fictionalizing 'just compensation' ", so recently condemned by the Court in *United States v. General Motors Corporation*, 323 U. S. 373, 381 (1945).

(C) The Government does not meet the argument that the statute fails to establish standards for administrative action.

It is clear that however great the evils of public utility holding companies were considered to be, Congress could not leave it to a Commission, in so many words, to tear them apart or dissolve them as the Commission should see fit. The question is how far short is the provision here of such a clearly unconstitutional delegation.

The activating phrases for procedure under this section are "unfair or inequitable distribution of voting power" and "undue or unnecessary complication of structure". But the section appears to leave wholly open the question of how the vote or the complication of structure is to be corrected. This would mean that under the Act, as construed

by the Commission, the Commission could, for example, choose either to decree the dissolution of a sub-holding company, with the damage that this involves to the sub-holding company and its security holders, or to decree divestment of the sub-holding company stock by the parent, visiting any damage on that company and its security holders.

We have pointed out in our main brief that the activating phrases are nowhere defined in the statute (pp. 60-61). We have also pointed out that they have no accepted legal or commercial meaning (Main Br., pp. 60-70).

Of course the term "fair and equitable" has a recognized legal meaning as applied to the distribution of property interests. It is in this connection that "fair and equitable" is used in Section 11(d) and 11(e). That meaning —of conforming as nearly as may be to pre-existing relations—is wholly different from the meaning in which the phrase "unfair or inequitable" is employed in Section 11(b)(2)—which implies change in the established relation. We pointed out that the Commission has made no attempt to define these phrases, but has proceeded on a case to case basis, and that this is eminently true in the Findings and Opinion here. The Commission has not made "the inquiry envisioned by Section 11(a)" referred to in the Government's brief (p. 149), through which Congress seemed to contemplate something other than case to case procedure.

Counsel for the Government refer (Br., p. 152) to *National Broadcasting Company* v. *United States*, 319 U. S. 190 (1943). But there, under the Federal Communications Act the Federal Communications Commission did just what the Commission has not done here. It set up a general standard and regulations for the entire industry according to the "public interest", prior to taking any

action on the application of any party. This Court has expressly held that the "public interest" carries a well-defined meaning through a long series of decisions—a situation exactly contrary to that surrounding Section 11(b)(2). It seems probable that some setting up of a general standard is what was contemplated by Congress in Section 11(a).

The answers to the vital lack of any clear and objective standards in Section 11(b)(2) are remarkable.

The Government falls back on the suggestion that American ought not to object to the lack of standards in the Act, as the president of one of the companies in the Bond and Share system had testified before a Congressional committee that the Commission should not be placed "in a straight-jacket" (Govt. Br., pp. 150-151). Any suggestion by a corporate executive can hardly justify delegation by Congress of arbitrary power.

The other branch of the Government's answer is that the meaning of the wholly general and substantive phrases is to be gleaned from the reports of the Federal Trade Commission and committees which preceded the adoption of the Act, and from study of what is going on in the bankruptcy reorganization cases (Govt. Br., pp. 149-150).

Clearly phrases in a statute which are used as a basis for destroying a company and vitally affecting the interests of security holders should be sufficiently clear so that those affected would know their rights without having to make a guess as to what is the effect of the voluminous set of reports.

Looseness in standards to be applied by public officers in passing on affirmative action sought to be taken by private interests is one thing. Absence of standards for the tearing down by public authorities of a structure of ownership,

lawfully created, of a lawful business, is a very different thing.

As the statute stands, it presents a clear case of "delegation running riot" (295 U. S. 495, 553).

The orders of the Commission appealed from should be set aside in all respects.

Respectfully submitted,

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November 13, 1945.

Nos. 466 and 467

In the Supreme Court of the United States

OCTOBER TERM, 1944

AMERICAN POWER & LIGHT COMPANY, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ELECTRIC POWER & LIGHT CORPORATION, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 166

AMERICAN POWER & LIGHT COMPANY, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

No. 167

ELECTRIC POWER & LIGHT CORPORATION, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION

OPINIONS BELOW

The findings and opinion of the Securities and Exchange Commission (R. II, 523–672), not yet officially reported, are set forth in the Commission's Holding Company Act Release No. 3750. The

opinion of the United States Circuit Court of Appeals for the First Circuit (R. 869–899) is reported in 141 F. (2d) 606. On April 18, 1944, that court entered an order denying the petitioners' applications for rehearing.

JURISDICTION

The judgments of the circuit court of appeals were entered March 17, 1944 (R. IV, 900–901). The petitions for writs of certiorari were filed June 16, 1944. The jurisdiction of this Court is invoked under Section 24 (a) of the Public Utility Holding Company Act of 1935 (49 Stat. 803, 834–835; 15 U. S. C., Sec. 79x (a)) and Section 240 (a) of the Judicial Code, as amended (28 U. S. C., Sec. 347 (a)).

STATUTE INVOLVED

The statute involved is the Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 U. S. C., Sec. 79, hereinafter referred to as "the Act"). The respondent's order was made under Section 11 (b) (2) of the Act (49 Stat. 803, 821, 15 U. S. C., Sec. 79k (b) (2)), which reads as follows:

> SEC. 11. * * *
>
> (b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:
>
> * * * * * *
>
> (2) To require by order, after notice and opportunity for hearing, that each regis-

tered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company.

The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated

do not exist. Any order made under this subsection shall be subject to judicial review as provided in section 24.

QUESTIONS PRESENTED

1. Is Section 11 (b) (2) of the Public Utility Holding Company Act of 1935 as construed and applied by the Commission a constitutional exercise of the commerce power, free from infirmity under the due process clause or any other provision of the Constitution?

2. With respect to the application of Section 11 (b) (2) to the facts presented in this case:

(a) Did the Commission, in applying the statutory standards, properly find that the corporate structure or continued existence of the petitioners unduly complicated the structure of the Bond and Share system and caused an inequitable distribution of voting power among the security holders of that system?

(b) Assuming that such finding was correct, was the Commission warranted in concluding that liquidation and dissolution of petitioners was an appropriate remedy to ensure elimination of the statutory evils?

3. Did the Commission properly decide certain procedural questions?

4. Did the court below properly refuse to pass on certain questions not raised before the Commission?

Petitioners seek to bring all of these objections before this Court as well as urging review of the

merits of the questions not considered by the court below.

STATEMENT

The Bond and Share system consists of Electric Bond and Share Company, a registered holding company incorporated in New York, at the top; an intermediate layer consisting of five sub-holding companies including petitioners; and a great number of operating companies at the base of the pyramid, conducting utility operations in 32 states and numerous foreign countries. At each of these levels, there is a variety of senior and junior securities outstanding. (R. II, 535, 536 n. 19, 625, 626, 659, 660.)

Section 11 (b) (2) of the Public Utility Holding Company Act makes it the duty of the Commission to determine, after hearing, what steps should be taken by registered holding companies and their subsidiaries to ensure that the corporate structure or continued existence of such companies does not unduly or unnecessarily complicate the structure of the holding company system of which they are a part, or does not unfairly distribute voting power among security holders of the system. It is the policy of the Act, set forth in Section 1 (c) thereof, "to provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided".

After extensive public hearings, the Commission determined that the continued existence and corporate structure of petitioners unduly and unnecessarily complicated the structure of the Bond and Share system and unfairly and inequitably distributed voting power among the security holders of that system[1] (R. 11, 635). It expressed its conclusions in some detail in an opinion which dealt also with certain objections by the petitioners to the Commission's conclusions and to its procedure. The extensive opinion of the Commission (R. II, 523–649, 657–672) is of particular importance because it is in the nature of an agreed statement of the facts and issues. The opinion, before it was issued, was examined by the petitioners and they stipulated on the record that they did not desire to file briefs or to make oral argument. They agreed that the Commission might enter the opinion but reserved all legal and constitutional rights including the

[1] Section 2 (a) (9) defines "Holding-company system" as "any holding company, together with all its subsidiary companies * * * ." The system known as the "Bond and Share system" includes Bond and Share, all its subholding companies such as petitioners, and all the operating companies at the base of the pyramid. Thus, the Commission's determination as to the unwholesome effect on the Bond and Share system of the continued existence and corporate structure of petitioners, was a finding based on the relationship and function of petitioners with reference to all the companies in the system and their security holders and not (as petitioners seem to assume) merely with reference to Bond and Share itself. (Cf. Pet., No. 166, pp. 17–18.)

right to full judicial review of the findings contained in the opinion. (R. II, 522.) In preparing for the possibility of review petitioners filed petitions for rehearing (R. II, 673–676). The petitions stated that "the matters herein stated as grounds for rehearing, and respondents' contentions with respect thereto, have been fully stated in the record and are dealt with by the Commission in its said findings and opinions" (R. II, 674, 676). The Commission's opinion is thus a basic source of the facts and of the contentions of the parties raised before the Commission.[2]

The record as summarized in the opinion of the Commission (and also of the circuit court of appeals) shows that the continued existence of petitioners constitute unnecessary complication because they serve no useful purpose either functional or financial. On the contrary, they affirmatively serve an undesirable function because they were created and are used by Bond and Share as pyramiding and leverage devices to enable Bond

[2] The procedure adopted in this case was one designed toward a possible amicable conclusion of the proceedings without litigation. In fact, petitioners advised their security holders after the issuance of the order that they did not intend to seek review of the order and indicated their change of mind only on the last day on which review was permitted. These facts concerning the proceedings are of relevance in connection with the attempt of petitioners to urge before the circuit court of appeals and this Court questions not raised before the Commission.

and Share to control billions of dollars in operating companies with little or no investment.[3]

The general pattern followed by Bond and Share in developing its system through the instrumentality of subholding companies is described by the Commission, with much supporting detail, as follows (R. II, 569–571):

> * * * assets were placed on the books of the subholding companies at sums considerably in excess of their cost to Bond and Share and its associates in the particular venture (the "syndicate"); the subholding company would then issue to Bond and Share and associates senior securities (either notes or preferred stock) in a face amount more than sufficient to cover the cost of the assets turned over to the subholding company, and would also issue subtantial amounts of common stock (having a majority of total voting power) against the company's inflated investment account. Bond and Share and associates would sell to the public the senior

[3] The creation and use by Bond and Share of petitioners is a classic example of certain of the evils which it is the declared policy of the Act to eliminate, including, as specified in Clauses 1 and 3 of Section 1 (b), i. e., the evils which arise "when such securities are issued upon the basis of fictitious or unsound asset values having no fair relation to the sums invested in or the earning capacity of the properties and upon the basis of paper profits from intercompany transactions, or in anticipation of excessive revenues from subsidiary public-utility companies * * * or when control of such companies is exerted through disproportionately small investment."

securities plus a bonus of common stock, for the approximate face amount of the senior security, thereby recouping all cash outlays; the promoters would then be left with substantial blocks of common stock at no cash cost (sometimes indeed with a cash profit) which they would divide among themselves, the lion's share always going to Bond and Share as "manager" and promoter of the venture. Thus, Bond and Share would emerge with a substantial block of voting stock at no cost, and complete control of the new corporation (and its subsidiaries) assured through the concentrated voting strength of its common stock holdings and the execution of Bond and Share's standard "service contract" whereby Bond and Share employees "officered" the company, formed more than a majority of its board, and "took over the management of the company and its subsidiaries."

As a corollary to this method of financing the subholding companies, there also invariably resulted a serious inflation in the accounts of the operating company subsidiaries which were set up. Since the assets received at organization by the subholding companies were generally entered in their book accounts at inflated figures, they were transferred by the subholding companies to the operating companies at sums embodying at least an equivalent amount of inflation and sometimes a greatly increased amount. In this way there was passed over to the

> consumer the burden of supporting the watered capitalization of both operating company and the subholding company, while the public investors in the securities of the operating company and the subholding company who may have purchased their securities in reliance on balance sheets containing serious inflation were not informed thereof.

Although on a corporate chart the Bond and Share system consists in most cases of the top holding company, Bond and Share, sub-holding companies such as the petitioners, and at the base operating companies, this picture is in fact deceptively oversimplified for as the Commission stated (R. II, 625):

> * * * each of the major corporate units at the base of the system itself has a complex capital structure in which the principles of pyramiding and leverage are employed in very full measure. Upon each such corporate structure there is superimposed a holding company with a complex structure of its own, and in turn, upon this holding company there is superimposed still another holding company having its own unduly complex structure, a high degree of pyramiding being employed in the process of superimposition.

American and Electric interpose in each instance at least three layers of securities in the hierarchy of claims commencing with the bonds of the operating companies and leading, in inverse

order of rank, to the common stock of Bond and Share[4] (R. II, 536, 537, 543). As the Commission stated in its opinion (R. II, 626):

> * * * From an examination of these charts, it is evident that although ostensibly the system is comprised of only *three* levels, nevertheless, income derived from the basic functions of the system, namely the generation and sale of electric energy and gas, cannot reach the common stockholders of the top holding company until it has been filtered through *seven to fourteen* classes of securities having prior claims to such earnings.

The record shows that throughout their entire existence until November 1935 (the date when the registration provisions of the Act became effective), the petitioners were mere "paper" companies and did not have a single employee of their own. All officers of the petitioners were employees of Bond and Share, paid exclusively by it, and all activities performed for or in the name of the

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[4] Reference to the analysis of sources of income in the charts constituting Appendix B–2 and B–3 (R. II, 658, 659) to the Commission's opinion illustrates the complex analysis necessary to appraise the nature of the claim against ultimate operating revenues which is represented even by the various securities of petitioners. As we note below, further complications result from the dividend arrears on the preferred stock of the petitioners. Appendix B–2 to the Commission's opinion shows the effect of the complexity upon the status of security holders of Bond and Share at the apex of the pyramid (R. II, 658).

petitioners were performed by employees of Bond and Share.[5] Corporate lines and identities were wholly disregarded. There was one large organization, and that organization was Bond and Share. Functionally, all the other holding companies were, as the Commission found, mere sets of books in Bond and Share's office. (R. II, 561–563, 592.)

In November 1935, formal but unsubstantial change was effected. On the advice of counsel, the names of the sub-holding companies were lettered on the doors of a few offices of the Bond and Share office building and a handful of Bond and Share's employees together with the respective books of accounts were removed into each of the offices. Some shifting around of directorships was effected but in the practical operation of the system nothing was changed.[6] The sub-holding companies, including petitioners, remained and still

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[5] At all times more than a majority of the board of directors and executive committees of petitioners were employees and directors of Bond and Share or persons affiliated with it. Even when petitioners were engaged in dealing with Bond and Share in the purchase of assets involving hundreds of millions of dollars (transactions yielding enormous profits for Bond and Share), they were represented solely by employees and counsel for Bond and Share. (R. II, 592–595; see, e. g., R. III, 825.)

[6] Full control was retained by Bond and Share and the operations of the public utility companies of the system continued to be supervised and dominated by Bond and Share. Each of the petitioners has at the present time a staff of from 15 to 20 employees consisting in the main of

are functionless in regard to the operations of the system. (R. II, 597–598.)

Moreover, petitioners perform no financial functions in respect of the operating companies. Because of their top-heavy structures and enormous preferred dividend arrears,[7] petitioners are unable to raise any capital, and in any event the operating companies have better credit standing. (R. II, 608, 610.)

Most of the money raised by petitioners when it was still possible for them to sell securities, was used in connection with the purchase of control of existing public utility companies, and generally the transactions were so arranged that the subholding companies purchased the securities from Bond and Share at enormous profits to that company and permitted Bond and Share to retain control over a nation-wide system by using other peoples' money (R. II, 569–570).

In summary, the Commission found that "whatever may have been the situation in the past, there

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the corporate officers and a few clerical assistants which, as the Commission found, "is sufficient merely to perform necessary routine activities incident to the functioning of the subholding companies as corporate owners of securities." (R. II, 597.) In contrast, the personnel employed by the subsidiaries of American exceed 12,000, and of Electric, 14,000 (R. II, 542, 549). Clearly, as the Commission found, there was no role for petitioners to perform in regard to the operations of the public utility companies (R. II, 634).

[7] See p. 24, note 16, *infra*.

is no indication that any of the operating companies will be in a position of requiring, or that [petitioners] * * * will be in a position to furnish, any benefits in the future" (R. II, 612); and concomitant with their uselessness, the existence of the petitioners has resulted in major complication of the Bond and Share System (R. II, 626–635).

The Commission concluded that "it is indisputable that American and Electric are not only *undue* complexities but are wholly *unnecessary* ones, inasmuch as there is not now, nor has there ever been, reason or purpose for their existence except as instrumentalities through which Bond and Share is able to control their systems by a pyramiding arrangement wholly repugnant to the statute. Neither for their subsidiaries nor for their own investors do these subholding companies perform, or have they ever performed, any useful function; indeed for the latter, they entail unnecessary expense and serious complications from an investment point of view * * *" (R. II, 634).

Not only do the corporate structures and continued existence of petitioners unduly and unnecessarily complicate the structure of the holding company system involved, but also they unfairly and inequitably distribute voting power among security holders in that system. In the case of American, Bond and Share controls through it 16 public utility subsidiaries by means of an in-

vestment in voting securities which cannot be more than 3.42 percent of the total amount invested, and it controls 10 public utility subsidiaries through Electric by means of an investment in voting securities which cannot be more than 8.72 percent of the total amount invested[8] (R. II, 621,

[8] Petitioners dispute the Commission's computation and argue that no conclusion as to unfair and inequitable distribution of voting power can be reached by comparing the investment through which Bond and Share controls the system with the total amount invested in the system. They argue that comparison of Bond and Share's investment should be made only with the investment of others holding securities of the same class. However, this argument mistakes the standard set forth in the statute. Section 1 (b) (3) of the Act indicates that Congress was aiming at the evils of "control * * * exerted through disproportionately small investment." Thus Bond and Share's investment in the common stock of petitioners is the means by which it exercises complete and pervasive control over all the assets of petitioners and their subsidiaries (R. II, 614–618). The standards of the statute are applied when this investment through which control is exerted is compared with the total assets which Bond and Share controls by reason of that investment. It is irrelevant for this purpose whether the assets it controls are assets which have debt claims or equity claims against them. In considering whether the distribution of voting power finally arrived at is unfair, the Commission did not, of course, assume that percentage of voting power and percentage of investment should be equal. Rather, it assumed that there should be a weighting for greater degree of risk. See *National Power & Light Company*, 9 S. E. C. 978, 992 (1941). However, the figures mentioned above show such a lack of proportion between voting power and investment as to make it readily apparent that no possible weighting could change the fact that control was exerted "through dispro-

622, 624). These figures were reached by the Commission on an analysis of the petitioners' books themselves. Actually control is exercised by reason of an even smaller investment because the book figures are overstated by reason of large write-ups and deficient depreciation reserves.[9] (R. II, 619, 620, 622, 623.)

In the light of these findings, the Commission concluded that (R. II, 636):

> * * * it is apparent to us that appropriate action to be required of American and Electric consonant with the statute is their prompt dissolution. While some

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portionately small investment" and that the distribution of voting power was unfair and inequitable.

Petitioners criticize certain computations involving write-ups for setting off minus figures in some operating companies against plus figures in others. These computations are perfectly proper, for the task of the Commission was to determine *system investment*, which required a net figure rather than a process of equity evaluation in which all plus figures could be added and minus figures disregarded. In any event, these computations are not basic to the Commission's conclusions, which are amply supported even by the book figures *before* considering write-ups and deficient depreciation reserves (see note 9, *infra*). In addition, no complaint of these computations was made before the Commission and no assertion of any such error was made in the petition for rehearing before the Commission.

[9] Petitioners would convey the impression that it was only upon consideration of the write-ups and deficiencies in depreciation reserves, that the inequity in voting power distribution was found. The figures in the text, taken from the Commission's opinion (R. II, 621, 622, 624), show the obvious inequity on the basis of the Bond and Share system's own books, before adjustments for write-ups and depreciation deficiencies.

> measure of amelioration in their statutory offensiveness might be afforded by other approaches, in our opinion no approach presently available holds out the promise of effectuating the statute's requirements fully or promptly. * * *

The Commission's orders provided (R. II, 650–655) that the existence of both petitioners "shall be terminated" and that they "shall be dissolved." It further ordered that petitioners and Bond and Share "shall proceed with due diligence to submit to this Commission a plan or plans for the effectuation of this order, and shall take such other and further steps as may be necessary or appropriate to effectuate this order" (R. II, 651, 654).

Pursuant to Sections 11 (b) and 24 (a) petitioners sought review of the orders in the circuit court of appeals. That court unanimously sustained the orders.

DISCUSSION

(1) *The constitutionality of Section 11 (b).*— This Court has granted petitions for certiorari in *Engineers Public Service Co.* v. *Securities and Exchange Commission,* No. 16, and it has placed on its special calendar *The North American Co.* v. *Securities and Exchange Commission,* No. 1, wherein the question of the constitutionality of Section 11 (b) (1) of the Act is raised. Sections 11 (b) (1) and 11 (b) (2) present the same basic constitutional questions.

Although we believe the decision of the court below in the case at bar to be clearly correct and there is no conflict of decisions,[10] we do not oppose the granting of the writs on the constitutional questions.

(2) *Liquidation and dissolution of petitioners.*—On the basis of the record as detailed in its opinion, the Commission found that the continued existence of the petitioners unduly complicated the structure of the Bond and Share system and caused inequitable distribution of voting power among the security holders of that system. It then determined that the appropriate remedy to ensure elimination of these statutory evils was the liquidation and dissolution of the petitioners. These conclusions are questioned by petitioners.

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[10] For other cases sustaining the constitutionality of Section 11 (b) (2) see *Commonwealth and Southern Corp.* v. *S. E. C.*, 134 F. (2d) 747 (C. C. A. 3, 1943); *Central and South West Utilities Co.* v. *S. E. C.*, 136 F. (2d) 273 (App. D. C., 1943); *In re Community Power and Light Co.*, 33 F. Supp. 901 (S. D. N. Y., 1940). In none of the cases involving the constitutionality of either Section 11 (b) (2) or Section 11 (b) (1) has any judge dissented from the holding that these sections are valid. For cases sustaining the constitutionality of Section 11 (b) (1) see *North American Company* v. *Securities and Exchange Commission*, 133 F. (2d) 148 (C. C. A. 2, 1943), certiorari granted, No. 1, this Term; *Engineers Public Service Company* v. *Securities and Exchange Commission*, 138 F. (2d) 936 (App. D. C., 1943), certiorari granted, Nos. 15 and 16, this Term; *United Gas Improvement Company* v. *Securities and Exchange Commission*, 138 F. (2d) 1010 (C. C. A. 3, 1943)

As has been briefly indicated above and more fully in the opinion of the Commission and the circuit court of appeals, the existence of petitioners and their relation to the Bond and Share system constituted prime examples of undue complexity and inequitable distribution of voting power flowing from the pyramiding of holding companies. In considering an appropriate remedy, there had to be borne in mind not only the fact that the very existence of petitioners was found to violate the standards of the Act, but also the policy of the Act "to provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided" (Section 1 (c)). Termination of existence and dissolution was, then, the obvious remedy called for by the Act.[11] The Court may not wish to consider the appropriateness of the remedy

[11] Petitioners (Pet., No. 166, pp. 28, 29) erroneously interpret as a congressional intent to remove dissolution as an available remedy, the fact that in Section 11 (b) (2) the language "to be reorganized or dissolved" was changed to "such steps as the Commission shall find necessary to ensure" that the statutory standards would not be violated. The legislative history contains no basis for an assertion that this change from specific to more general standards was intended to restrict rather than broaden the Commission's choice of remedies under the statute. Petitioners' arguments that Congress did not intend to provide for the elimination of public utility holding companies are based on a misreading of the legislative history, and are inconsistent with the plain meaning of Section 11 (b) (2) and Section 1 (c), which latter section also states that all the provisions of the Act shall be interpreted in accordance with its policy.

selected by the Commission. In order to indicate the basis of the Commission's decision, however, we point out that the remedy chosen was effective, complete, and well adapted to "ensure" (in the language of Section 11 (b) (2)) that the "continued existence" of petitioners would no longer offend. It was also a practical way of handling the problems, as the earlier order requiring the dissolution of National (another subholding company of Bond and Share) had indicated. As petitioners recognize (Pet., No. 166, p. 27) the order of dissolution herein is of a type entered by the Commission in a number of other proceedings.

True, a lesser remedy such as termination of Bond and Share's control would have alleviated the extent of maldistribution of voting power in the system, and brought about some simplification; but Bond and Share's control is only one factor, though an important one, in the present failure to meet the standards of Section 11 (b) (2). The continued existence of petitioners, as unnecessary complexities with burdensome and useless structures, would remain, in contravention of Section 11 (b) (2). To permit survival, it would, then, also have been necessary to endow petitioners with function and purpose, revamp their structures, confine the operations of their systems in accordance with Section 11 (b) (1), and revise their relations with their subsidiaries; in short, there would have remained practically nothing resembling American and Electric as they now exist. It is not the Commission's duty under

Section 11 (b) (2) to seek means to preserve holding companies whose dissolution is so obviously called for.[12]

The Commission was fully warranted in concluding (R. II, 636):

> It cannot be doubted that the dissolution of these companies which not only have never served any useful purpose but have been a medium of much harm, will effectuate the provisions and policies of the Act and will in all respects be beneficial to the public interest and the interest of investors and consumers; and we so find.

The Commission believes that the decision of the circuit court of appeals sustaining its position on these points is clearly correct.[13] However, since

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[12] Although it did not seem likely, the Commission indicated (R. II, 647–648) that if it should ever develop that petitioners' functions, structures, system operations, and relationships did so change as to permit their continued existence, the next-to-last sentence of Section 11 (b) (2) would afford appropriate relief. That sentence reads: "The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist."

[13] The Commission has entered many orders under Section 11 (b) (2) of the Act. In every case in which review has been sought, the Commission's orders have been sustained by the circuit courts of appeals. *Todd* v. *S. E. C.*, 137 F. (2d) 475 (C. C. A. 6th, 1943) (International Hydro Electric System, a corporation, ordered "to liquidate and dissolve"); *Commonwealth and Southern Corp.* v. *S. E. C.*, 134 F. (2d) 747 (C. C. A. 3d, 1943) (Commonwealth & Southern ordered to recapitalize on an all-common-stock basis); *Central and South West Utilities Co.* v. *S. E. C.*, 136 F. (2d) 273 (App. D. C. 1943) (orders requiring Central and South-

this is the first case under Section 11 (b) (2) to be presented to this Court, the Commission does not object to the granting of certiorari on these issues.[14]

3. *Procedural Questions.*—(a) Petitioners assert that the Commission erred in refusing to pass definitely on certain Section 11 (e) plans prior to entering the Section 11 (b) (2) order (Pet., No. 166, p. 25). This contention is disposed of in the Commission's opinion, in which the Commission discussed the nature of the plans and indicated that the plans, filed after the proceedings were well under way, contained no promise of altering the necessity of dissolving petitioners and also observed that the plans were too vague and indefinite to warrant holding up the dissolution orders (R. 639–647). As a procedural question, this judgment should be left to the Commission. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 143.

---

west Utilities Company and American Public Service Company, its subsidiary, to eliminate either company and recapitalize the remaining company on an all-common-stock basis). Most of the procedural points raised by petitioners herein were considered and found untenable in these cases in the circuit court of appeals. The instant cases are the first in which petitions for certiorari have been filed.

[14] *Otis & Company* v. *Securities and Exchange Commission*, before this Court on petition for certiorari; No. 81, this Term, involves merely the question of the fairness of allocation between different classes of security holders in carrying out an order of dissolution under Section 11 (b) (2). The dissolution order itself was not contested and its validity is not involved in the case pending before this Court.

(b) Petitioners assert that the Commission should have made public a report on an investigation of petitioners' systems under Section 11 (a) of the Act, prior to instituting the Section 11 (b) proceedings, and ought similarly to have first completed its proceedings under Section 11 (b) (1) of the Act. As the court below held (R. IV, 877–878), the Commission's notice of and order for hearing plainly discloses that the investigation within Section 11 (a) was in fact made (R. 27–28), and the court approved the decision of the Circuit Court of Appeals for the Third Circuit in *Commonwealth and Southern Corp.* v. *S. E. C.*, 134 F. (2d) 747, to the effect that the Commission is not obliged to treat Section 11 (b) (1) problems before it enters Section 11 (b) (2) orders.

The Commission has frequently been confronted with similar arguments to the effect that it should postpone action on the matters at hand in order to engage in some other (and time-consuming) activity. These arguments, quite apart from their lack of support in the Act, are inconsistent with the direction in Section 11 (b) that the Commission make its determinations thereunder "as soon as practicable," and with the policy expressed in Section 1 (c) that it is a purpose of the Act "to provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided".

(c) Petitioners assert (Pet., No. 166, p. 19) that the Commission erred in not permitting the

introduction of evidence by American (though not by Electric)as to the amount of money it would cost to reproduce the properties owned by the subsidiaries of petitioners (R. II, 532).

The undisputed evidence before the Commission, briefly summarized in the statement *supra*, established undue complexity and inequitable distribution of voting power in violation of the statutory standards. In the light of such evidence the testimony offered could not have affected the fact that control of the operating companies was "exerted through disproportionately small investment," the standard fixed by Section 1 (b) (3).[15] Moreover, evidence on reproduction cost could not affect the pertinent data which the Commission had before it on earning power, showing that the operating companies were unable to earn enough on their watered capitalization to support the top-heavy holding company structures above them.[16]

[15] The offer of proof (R. I, 240–253) was to the effect that American's interest in its subsidiaries would be established at $315,500,000 on the basis of "reproduction cost" of the subsidiaries' properties (R. 251). Even if we substituted this figure for the $303,837,930 at which American's investments are valued on the books of its subsidiaries (R. II, 665), the only result would be that the computation of the extent of inequitable distribution of voting power in the system would be altered to make Bond and Share's control exercised through 3.83% of the "present value" of the system rather than the 3.42% upon which the Commission based its finding.

[16] As of December 31, 1941, the two issues of American's preferred stocks were in arrears in the amount of $35,000,000; Electric's two issues of senior preferred stock were in arrears $45,000,000 and its junior preferred stock was in arrears $5,000,000 (R. II, 537, 544).

In addition, the testimony offered, being reproduction cost evidence, was in its nature unreliable and could fairly be regarded as incompetent. Finally, even if it be assumed that such evidence would, as an abstract proposition, be of some slight relevance, the evidence was offered on the final day of two years of hearings and would have had the effect of prolonging the hearings for a period out of all proportion to its value. Since the testimony would have been ineffectual, irrelevant, incompetent and dilatory, the Commission was abundantly justified in not receiving it. The argument that the Commission should take time to listen to irrelevant evidence as to reproduction cost should be classified with petitioners' other time-consuming suggestions that instead of deciding the Section 11 (b) (2) issues the Commission should pass on vague and indefinite Section 11 (e) plans, or decide Section 11 (b) (1) issues, or start again with Section 11 (a) investigations labelled as such, or endeaver to revamp petitioners' structures and functions so that they will not be unnecessary complexities.

The argument of petitioners that the Commission, having relied upon the past history of the system, was obliged to receive reproduction cost testimony in order to find present facts, sets up a false antithesis. The history of the system showed that the petitioners have performed no substantial functions save to create undue complexities and inequitable distribution of voting

power in the system. The proffered evidence of reproduction cost was, for the reasons already stated, of no value on the issues before the Commission in this proceeding.

(d) Petitioners make certain contentions as to the form of order not passed on by the court below. They assert that the order of the Commission does not specify the "steps" which petitioners must take and that it thereby deprives petitioners of the one-year period of compliance granted by Section 11 (c) of the Act. Petitioners further assert that they are unable to comply with the orders because their companies can be technically dissolved only by a stockholders' vote. The spuriousness of these arguments is shown by the fact that a similar order (of which no review was sought) has been entered by the Commission requiring the dissolution of National Power and Light Company, another subholding company in the Bond and Share system, and National, as the records of the Commission show, has made substantial progress toward complying with such order. The general directional order, specifying the ultimate step which must be taken to comply with Section 11 but not spelling out the details, is similar to the decree entered by this Court in similar circumstances in *United States* v. *American Tobacco Co.*, 221 U. S. 106, 187–8; and the federal courts, given power over petitioners and their assets wherever located, under Sections 11

(d) and 11 (e) of the Act, can carry out the Commission's order.

The decision of the Commission and, to the extent passed on below, of the circuit court of appeals on these procedural issues is, it is believed, clearly correct. We question whether the petitioners' contentions in these respects are of sufficient substance to warrant review by this Court.

4. *Reviewability of questions not raised before the Commission.*—The circuit court of appeals refused to pass on certain of the above objections of the petitioners because the objections were not made before the Commission. Section 24 (a) of the Act, which governs review, provides that no objection to an order of the Commission shall be considered unless it was urged before the Commission or unless reasonable grounds exist for failure to do so. The issues involved are (1) that Section 11 (b) (2) does not as a matter of statutory interpretation authorize the dissolution of subholding companies (see p. 19, note 11, *supra*); (2) the procedural questions discussed under (d), pages 26–27, *supra*.

Despite the fact that these questions were not raised before the Commission, the Commission briefed and argued them before the circuit court of appeals, and will include a discussion of them in the brief if certiorari is granted.

If this Court should conclude that the court below unduly limited the scope of review, it is submitted that this Court itself should consider the

merits of the issues not passed on by the circuit court of appeals. To remand the case for consideration of these issues by the circuit court of appeals would unduly protract this litigation. It would, moreover, doubly defeat the purpose of Section 24 (a), for petitioners would not only be able to withhold their arguments from the Commission, but in addition would further delay enforcement of the Act by having their appellate review broken up into a multiplicity of stages. Accordingly, we urge that if the Court is of the opinion that any of the contentions not passed on by the court below are properly subject to review, this Court should hear such arguments on the merits and decide them without a remand.

CONCLUSION

While believing the decision below to be correct, for the reasons stated the Commission does not oppose the granting of certiorari.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

ROGER S. FOSTER,
Solicitor,
Securities and Exchange Commission.

JULY 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944

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No. 6 and 7

In the Supreme Court of the United States

OCTOBER TERM, 1945

AMERICAN POWER & LIGHT COMPANY, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ELECTRIC POWER & LIGHT CORPORATION, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION

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In the Supreme Court of the United States

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NOS. 6 AND 7

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BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION

OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals for the First Circuit (R. 869–899) is reported at 141 F. 2d 606. The findings and opinion of the Commission (R. 523–672), are reported at 11 S. E. C. 1146.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered March 17, 1944 (R. 900–901). The

petitions for writs of certiorari were filed June 16, 1944, and granted May 28, 1945 (R. 901). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, which is made applicable by Section 24 (a) of the Public Utility Holding Company Act of 1935 (15 U. S. C. § 79 x (a)).

QUESTIONS PRESENTED

1. Did the Commission properly find that the corporate structures and continued existence of petitioners unduly and unnecessarily complicate the structure of the Electric Bond and Share holding company system and unfairly and inequitably distribute voting power among the security holders of that system?

2. Did the Commission properly order dissolution of petitioners?

3. Is Section 11 (b) (2) of the Act constitutional as applied to petitioners?

4. Did the Circuit Court of Appeals properly refuse to pass on questions not raised before the Commission? If not, is there any merit to such contentions?

STATUTE INVOLVED

The statute involved is the Public Utility Holding Company Act of 1935 (Act of August 26, 1935, c. 687, Title I, 49 Stat. 803, 15 U. S. C. § 79 *et seq.*), herein referred to as the "Act". The respondent's order was made under Section

11 (b) (2) of the Act. The relevant provisions of the statute are set forth in Appendix A, *infra*, pp. 167–183. The background of the statute is described in the Commission's brief filed in this Court in *North American Company* v. *Securities and Exchange Commission*, No. 1,[1] at pp. 3–11.

STATEMENT[2]

1. *The Electric Bond and Share Company holding company system*

This Court has previously had occasion to consider certain aspects of the Electric Bond and Share Company holding company system and of the petitioners' relationships thereto.[3] *Electric Bond and Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419. In that case, which tested the constitutionality of the registration pro-

[1] Inasmuch as argument in the instant cases will be heard together with the arguments in the *North American* case and in *Securities and Exchange Commission* v. *Engineers Public Service Company, etc.*, Nos. 2 and 3, which also involve Section 11 of the Act, reference is made to the briefs submitted by this Commission in those cases to avoid undue repetition. These briefs will be referred to respectively as "our North American brief" and "our Engineers brief."

[2] Except where other reference is made, the facts are taken from the Commission's opinion (R. 523–672) the factual basis of which was not disputed by the petitioners. See pages 20–21, *infra*. Unless the contrary is indicated the brief speaks as of the time the record was closed.

[3] Electric Bond and Share Company is hereinafter referred to as "Bond and Share." Petitioners American Power and Light Company and Electric Power and Light Corporation are referred to respectively as "American" and "Electric."

visions of the Act, the Court pointed out the "highly important relation to interstate commerce and the national economy" (p. 441) of constituent companies of the Bond and Share system, including these petitioners, which were defendants therein. The stipulation which underlay the findings in that case has been specifically incorporated in the present record,[4] which includes also substantial additional data descriptive of the system.

The Bond and Share system is a pyramid-like structure of which Bond and Share itself constitutes the apex, five subholding companies (including the petitioners herein) create an intermediate tier, and approximately 237 direct and indirect subsidiaries of the latter form the base (R. 535). It is the largest public utility holding company system registered under the Act in point of book capitalization and assets, number of customers and areas served, and quantity of electricity generated and gas sold (R. 535–536). Its combined consolidated capitalization and aggregate book assets approximate $3,000,000,000.[5] In the

[4] R. 171; Comm. Ex. 68a–f.

[5] The capitalization and surplus of Bond and Share as of December 31, 1941, are stated on its books as follows (R. 536):

	Stated value
Capital Stock:	
$5 Preferred Stock, no Par	$28,030,000
$6 Preferred Stock, no Par	110,195,500
Common Stock, $5 Par	26,251,788
Surplus:	
Capital Surplus	316,504,930
Earned Surplus	63,116,392
Total Capitalization and Surplus	544,098,610

United States it supplies electricity or gas to more than 2,300 communities having a total population of some 12,000,000 and located in 32 states (R. 536).* In addition, electricity or gas is supplied to 1,021 communities located in 12 foreign countries, principally in Cuba and Central and South America (R. 536).

The generation of electricity and manufacture of gas and the distribution and sale thereof are carried on exclusively by the operating companies at the base of the pyramid. As described by this Court, some of these companies "operate only within a single State, some in two or more States, transmitting energy across state lines for their own account, and some sell energy at wholesale in interstate commerce." *Electric Bond and Share Company* v. *S. E. C., supra,* at p. 432.

The capitalization of these operating companies consists generally of bonds and preferred stocks, which are owned mainly by the investing public, and common stock, which is almost wholly owned by one or another of the subholding companies (R. 659–660). The subholding companies have capital structures consisting in the main of debentures, preferred stocks, and common stocks. Almost all the senior securities and, except in case of Electric, most of the common stock of these subholding companies are held by the investing public. In all instances control over the subholding companies and their subsidiaries is exer-

*See maps contained in Appendices B and C, *infra.*

cised by Bond and Share through a minority of the voting rights appurtenant to the stocks of the subholding companies (R. 614, 615–618, 658).[7] Despite its minority interests Bond and Share retains sufficient voting power to have effective control over the subholding companies, and through their ownership of the voting securities of the operating companies over all the operating companies of the system (R. 615–618). In the case of petitioners and their operating subsidiaries the control is complete and pervasive.[8]

[7] Bond and Share's holdings of common stock range from 18.9% in the case of American Gas & Electric to 57.3% in the case of Electric, and its voting power ranges from 17.5% to 46.8% (R. 614).

[8] See Chart contained in Appendix D.

Control by Bond and Share of the subholding companies (except American Gas and Electric, as to which see note 10, *infra*), as well as control by the subholding companies of their subsidiaries, has never been denied or put in issue. Not only is there a statutory presumption of control in Section 2 (a) (7) and (8) of the Act (see *Morgan, Stanley & Co.* v. *S. E. C.*, 126 F. 2d 325 (C. C. A. 2d (1942)), but the Commission expressly found such control to exist. The Commission found, for example (R. 615):

"* * * the record of the present proceeding establishes that Bond and Share's control is complete and pervasive.

"This control of the subholding companies by Bond and Share is not limited in operation to the mere casting of a certain percentage of votes at stockholders' meetings. It permeates every stratum and unit of the holding company system in the most comprehensive manner."

See also the testimony of American's president: "There is no question in my mind that Bond and Share is in control of American today, sir. We have admitted it." (R. 279).

Bond and Share is the top holding company in the system. Its assets, exclusively securities and cash, consist largely of common stocks in the five subholding companies which in turn hold only securities of the operating companies or of other subholding companies. The present petitioners, American and Electric, are two of these subholding companies which are direct subsidiaries of Bond and Share, the other three being National Power & Light Company,[9] American Gas and Electric Company,[10] and American & Foreign Power Company, Inc. (R. 535.)

Bond and Share also owns all of the securities of Ebasco Services Incorporated,[11] a service company (R. 596). Through it Bond and Share renders services to all the operating subsidiaries of American and Electric. Ebasco was organized in November 1935 to continue functions formerly carried out by the Bond and Share service department (Comm. Ex. 68a, p. 353). At that time Bond and Share's service contracts with the operating

[9] See pp. 19–20, *infra*.

[10] American Gas and Electric Company alone, among the subsidiaries of Bond and Share, appears to have had a certain amount of autonomy in the management of its affairs. However, its application to the Commission to be held not a subsidiary of Bond and Share was denied on the ground that it had not established that it was not subject to a controlling influence. *American Gas and Electric Company*, 9 S. E. C. 247 (1941), affirmed, *American Gas and Electric Company* v. *S. E. C.*, 134 F. 2d 633 (App. D. C.), certiorari denied, 319 U. S. 763.

[11] Hereinafter referred to as "Ebasco."

subsidiaries were assigned to Ebasco (*id.*, p. 355) and substantially all the employees of Bond and Share who had been engaged in servicing operating subsidiaries were transferred to Ebasco (*id.*, p. 359). Both Bond and Share and Ebasco are incorporated in New York (R. 549, Comm. Ex. 68a, pp. 352–353). From its central offices in New York City Ebasco makes purchases for and directs the shipment of equipment and accessories to the operating companies, none of which conduct their operations in New York State. Ebasco supervises the preparation of budgets for all the operating companies. It places insurance for them, advises on their accounting and engineering practices and procedures, assists in their sales campaigns, rate proceedings and tax returns, prepares reports to stockholders and others and advises and assists upon myriads of other problems. In connection with these activities a continuous stream of inquiries, instructions and reports borne by mail, wire and field representatives, travels back and forth between the home office in New York and the operating companies scattered throughout the United States. (Comm. Ex. 68a, pp. 362–384).[12]

[12] As pointed out in the opinion of the Court in *Electric Bond and Share Company* v. *S. E. C.*, *supra*, at p. 432:

"The performance of service contracts by Ebasco, operating as a subsidiary and on behalf of Electric Bond and Share Company, constitutes an extensive business in rendering continuous expert, specialized, and technical service, advice, and assistance to the serviced companies upon every phase of the utility enterprise."

American and Electric perform no services of significance for their subsidiaries, and their only function is to serve as conduits or instrumentalities for Bond and Share's control of the operating properties. Petitioners are Maine corporations organized by Bond and Share in 1909 and 1925, respectively. They were created and continued as devices by which Bond and Share could obtain or retain control over operating companies with a minimum of investment. They were used as a means of obtaining funds from the public by the sale of their own securities in amounts sufficient to pay for control of operating companies. Since in many instances controlling securities of these operating companies were already owned by Bond and Share, the result was that Bond and Share was reimbursed for its investment in these companies, often with a handsome profit, while it still retained control over the enterprise. (R. 554–600.)

Until 1935 American and Electric had no offices and needed none because they had no employees. Their books were kept by Bond and Share employees in Bond and Share's offices in New York along with those of Bond and Share's other "paper" companies. Their officers were employed by Bond and Share and were paid exclusively by Bond and Share. (R. 561–562, 592.)

In November, 1935, after the enactment of the Public Utility Holding Company Act of 1935, but shortly before the effective date of the registra-

tion provisions, Bond and Share detailed a small group of its employees to act solely as the new officers and as clerical personnel of each of its subholding companies, including the petitioners. Each subholding company with its newly assigned staff was then established in a small suite of offices in the Bond and Share office building in New York City, adjacent to those of Bond and Share and its wholly owned service subsidiary, Ebasco. Other superficial changes in the Bond and Share organization were made at the same time, none of which worked any fundamental change in Bond and Share's complete and pervasive control of American and Electric and all their operating subsidiaries. The personnel with whom Bond and Share staffed these companies still constitute their managements, and their boards of directors are comprised of officers of the companies and other persons selected by Bond and Share. (R. 592–598.)

The main steps in the creation of the Bond and Share system and the role which American and Electric played in its development are reviewed in the Commission's findings (R. 549–600). The Commission described the origin of the Bond and Share system as follows (R. 549–550):

> Bond and Share was organized under the laws of New York on February 27, 1905, by the General Electric Company, a leading manufacturer of electrical equipment. General Electric's purpose in the formation of

> Bond and Share seems to have been threefold: (1) to realize as fully as possible upon various utility securities which it had acquired in the process of selling its equipment; (2) to obtain for itself a direct proprietary stake in a promising young industry with which it was already closely affiliated; (3) to utilize the position it would acquire as a proprietary factor in the utility industry to advance the sales of its equipment.

Over a twenty-year period General Electric made a book investment of approximately $25,000,000 in Bond and Share in exchange for which it obtained the entire common stock of that company. In return it received more than $13,000,000 as cash dividends and in 1925, when General Electric disposed of its investment in Bond and Share, the market appraised its value at about $117,000,000.[13] (R. 550.)

The Commission's review of the various promotional activities which built up the system em-

[13] In December 1924, Senate Resolutions had been introduced directing the Federal Trade Commission to investigate General Electric's relationship to the electric power industry and shortly thereafter the board of directors of General Electric voted to "divorce" itself from Bond and Share. This objective was carried out by the declaration of a dividend to General Electric stockholders of shares of a new company set up to hold all the stock of Bond and Share. The new company was consolidated and merged with the old Bond and Share in 1929 to form the present company. The merger involved a write-up of approximately $400,000,000 which was followed by a write-down of $441 000 000 two years later. (R. 551–552.)

phasizes the dominance of a single personality, Sidney Z. Mitchell, and his successful realization of a financial method—largely dependent upon using the subholding companies as pyramiding and leverage devices—whereby Bond and Share could successively expand its control over the growing public utility industry with a minimum investment. This pattern was evidenced from the very beginning. (R. 552–553.) As early as the year following the creation of Bond and Share, American Gas and Electric was organized as a subholding company. Although that company is not involved in the present proceeding, the promotional steps followed in its organization are mentioned here as typical of the pattern of financial practices followed by Bond and Share in the organization of its other subholding companies including petitioners. Bond and Share made no permanent investment but "emerged with a profit of $30,000 cash and 4,700 shares of the company's common stock (having a par value of $235,000) equal to approximately 9.5% of the total voting securities * * *" (R. 553), as well as heavy representation on the board of directors and executive committee of the new company.

By the promotion of petitioner American, in 1909, Bond and Share realized cash profits of approximately $120,000 and emerged with cost free holdings of 29.47% of the common stock outstanding (representing 20% of the voting securities, carrying completely effective control of the new

company) (R. 554–558). American, on the other hand, had issued $8,000,000 par value of its own securities and had received in return therefor only $500,000 in cash together with securities which had recently cost Bond and Share less than $1,700,000 (R. 558). The Commission's review of the subsequent growth of American and its relations with Bond and Share recounts a series of transactions in the course of which American's capitalization increased by 1929 to $263,101,529, and its consolidated assets to $754,129,787 (R. 560–564). In the late twenties American paid enormously high prices in relation to underlying earnings and assets to acquire controlling stocks of established utilities; these transactions were usually effected by exchanges of securities, and a total of $164,000,000 of American's preferred stock was thus issued (R. 560–561, 566–567). Appendix G to the Commission's findings (R. 668) shows in tabular form the manner and costs of Bond and Share's acquisition of common stock of American, including the cash cost to an affiliated company later merged with Bond and Share. The total cash cost was but $10,880,250.30, of which over eight million dollars represented open market purchases the bulk of which occurred after the market crash in 1929 (R. 567).[14]

Electric was organized in March of 1925 to acquire two "baskets" of securities previously held by Bond and Share. In consequence of the

[14] See page 41, *infra*, for the capitalization of American.

promotional activities described in the opinion (R. 572–578) Bond and Share emerged with complete control achieved through 16% total voting power, holdings of "298,341 shares of common and 353,408 option warrants at no cost, 9,480 shares of second preferred stock at a cost of $854,904, and a net cash profit of approximately $6,500,000 on the securities surrendered to Electric, most of which had been held less than two years" (R. 578).

Electric in turn started off with an investment account stated on its books at $69,900,000 of which $46,655,352 represented write-up over cash cost of affiliated predecessors. Thus, there was no true cushion for the public investors who paid $40,000,000 for preferred stock of Electric. (R. 582–583.) As in the case of American, subsequent transactions involved use of the subholding company to finance acquisitions of additional operating company common stock (R. 583–592).[14a]

In one of the major transactions, acquisition of control of the Harvey Couch and other properties in Arkansas, Louisiana and Mississippi, Electric was successful in recouping its cash outlays and disbursements through resale to the public of senior securities of operating subsidiaries, leaving it with $26,500,000 stated value of second preferred and common stocks of subsidiaries for an initial investment cost of $10,800,000 stated value of its own securities (R. 583–586).

[14a] See page 44, *infra*, for the capitalization of Electric.

The other major transaction subsequent to the initial promotion of Electric involved the promotion of United Gas Corporation. This represented an exceptional instance where Bond and Share and the subholding company were forced to tie up substantial funds in the venture because market conditions precluded obtaining the necessary funds by a sale to the public of senior securities of the operating Company. Bond and Share made large loans, some of which were repaid directly or indirectly by means of cash supplied by Electric, and emerged at the conclusion of the financing with a $52,000,000 6% debt claim purportedly senior to the public investment in United Gas preferred stock as well as to Electric's investment in United Gas. Electric's own investment of over $60,000,000 in cash, plus securities stated on the books at $27,400,000, was represented by second preferred, common stock and option warrants of United. In connection with raising this cash Electric made a public sale of $31,000,000 of its debentures and $20,000,000 stated value of preferred stock. There was an attempt to raise additional funds from the public through an offering of rights to buy additional common stock of Electric, underwritten by Bond and Share. The offering was largely unsuccessful and Bond and Share was forced to make an aggregate investment on its direct subscription and as underwriter of $20,500,000. Although United Gas needed large sums for additional con-

struction and development, Electric's initial investment did not serve to supply this needed capital but was used to buy out at prices disproportionate to book assets those in control of predecessor companies. The fact that United Gas was thus initially launched with inadequate capital furnished the occasion for the Bond and Share advances on open account and also gave rise to future controversy over the status of its debt claim.[15] (R. 586–591.).

Apart from Bond and Share's involuntary subscription to Electric's stock in connection with United Gas Corporation transactions, it made no contribution to the capital of Electric. Its only other investment in Electric's common stock involved over $12,000,000 of open market purchases after the market crash in 1929 and 1930 (R. 591–592). (See Appendix G to Commission's findings, R. 669).

2. *Proceedings Below*

On May 9, 1940, the Commission instituted the proceeding now under review by the entry

[15] Subsequent to the closing of the record this was settled by a compromise payment pursuant to a plan approved by the Commission under which Bond and Share received $44,000,000 for this claim and other securities of United Gas held by it. See pp. 112–113, *infra*. This plan was negotiated subsequent to the Commission's institution of proceedings "to ensure a comprehensive investigation * * * of the respective claims and equities of its [United Gas'] various security holders * * *". *United Gas Corporation et al.*—S. E. C.—(1944), Holding Company Act Release No. 5271, pp. 10–11.

of a notice and order for hearing to determine what steps had to be taken by Bond and Share and its subsidiaries to comply with Section 11 (b) (2). One of the issues specifically stated was "whether it is necessary to discontinue the existence of * * * Electric Bond and Share Company or any of the other respondents." (R. 50.) The respondents in the proceeding were Bond and Share, its five major subholding companies (including the two petitioners herein), two *sub*-subholding companies and Ebasco Services Incorporated (R. 27, 30). In response to respondents' objections and requests relating to the scope of the issues, problems relating to American & Foreign Power Company and American Gas and Electric Company which appeared to involve different considerations from those relating to the other sub-holding companies were severed from the proceeding[16] and the hearing was initially confined to the sole issue of whether it is necessary to discontinue the existence of American, Electric, and National Power and Light Company or any of them.[17]

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[16] American Gas and Electric was dropped by the order dated June 7, 1940 (R. 64–66); American & Foreign Power was dropped by order dated June 17, 1940, referred to at R. 395 and published as Holding Company Act Release No. 2118.

[17] See order of June 7, 1940 (R. 64–66). Electric complains that the issues were so framed "as to make it appear either that nothing could be done with respect to the Bond and Share system pursuant to Section 11 or that Electric

In view of petitioners' statements as to the scope of the issues so raised we refer the Court to Section 2 (a) (9) of the Act, which defines a holding company system as "any holding company together with all its subsidiary companies * * *." Thus, while it is proper to refer to the American and Electric systems as separate holding company systems, the Bond and Share system includes both the American and

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must be dissolved. No alternatives were to be considered." (Brief p. 7; see also p. 35.) Electric neglects to point out that the order of May 19, 1940, limited the issues "initially" to be considered and did not preclude consideration of alternatives in the event that the initial issues should be resolved favorably to the respondents. Nor is it pointed out that this narrowing of the scope of the issues was in response to respondents' objections.

The original notice (dated May 10, 1940) included the following statement of issues (R. 50):

"(2) whether it is necessary to discontinue the existence of, or modify the corporate structure of, or redistribute the voting power among security holders of, said Electric Bond and Share Company or any of the other respondents herein; (3) what further action, if any, is necessary and shall be required to be taken by the respondents herein, or any of them, in order that each of the respondents herein which is a registered holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company, and (4) what further action, if any, is necessary and shall be required to be taken by the respondents herein, or any of them, to ensure that the corporate structure or continued existence of any of the respondents herein does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of the holding company system of Electric Bond and Share Company."

Electric systems as well as the systems of other subsidiary holding companies. Likewise, the term security holders of the Bond and Share system includes holders of securities in petitioners and their operating subsidiaries as well as security holders in Bond and Share. Statements in the briefs of petitioners evidence a correct understanding of this distinction, e. g. Amer. Br., pp. 7, 17, 93, 115, Elec. Br., p. 5. Nevertheless it is elsewhere incorrectly stated that the issues included solely the effect of or position of petitioners in the Bond and Share system and not their position or effect within their own systems (Amer. Br. p. 9; Elec. Br., p. 35). The implication is that the Commission could not consider the impact of their corporate structure and existence upon security holders of petitioners, or of petitioners' subsidiaries. This seems largely a play on words.

During the course of the hearing, in August 1941, the record as to National Power and Light Company was by stipulation deemed closed. The Commission thereupon issued its findings and opinion in which it found that the corporate structure and continued existence of National Power and Light Company unduly and unnecessarily complicated the structure and unfairly and inequitably distributed voting power among security holders of the Bond and Share system. *Electric Bond and Share Company et al.*, 9 S. E. C. 978. An order was entered requiring the dissolution of National. Holding Company Act Release No.

2962. National did not appeal and is proceeding to liquidate in accordance with the Commission's order.[18]

In July, 1942, the record, comprising more than 18,000 pages of testimony and more than 1,500 exhibits, was by stipulation deemed closed as to petitioners (R. 297). A stipulation as to procedure would have afforded respondents 25 days in which to except to proposed findings of the Commission, and 15 days for reply by the Commission's staff (R. 295). This procedure was later telescoped by the agreement described below and on August 22, 1942, the Commission issued its findings that the corporate structure and continued existence of both American and Electric unduly and unnecessarily complicated the structure and unfairly and inequitably distributed voting power among the security holders of the Bond and Share system; and that their corporate structures had the same effect in their own systems (R. 635). Orders were entered requiring that the existence of American and Electric be terminated and that these companies be dissolved. They directed Bond and Share, American, and Electric to proceed with due diligence to submit plans for the dissolution of American and Electric. (R. 650–655.)

At the conclusion of the hearing the petitioners had waived a trial examiner's report (R. 297). Copies of the Commission's proposed findings,

[18] See *infra*, pp. 117–120, as to the progress National has made in this respect.

opinion, and orders with respect to petitioners were then submitted to petitioners in advance of their adoption and after examining these the petitioners stipulated that they did not desire to file exceptions to any of the findings (R. 520–22). They stated that their objections were ruled upon by the Commission in its findings, opinion and order (R. 521–22). Similarly, in petitions for rehearing filed on August 27, 1942 (R. 673–676), petitioners stated that the grounds for rehearing and their contentions with respect thereto "have been fully stated in the record and are dealt with by the Commission in said findings and opinion" (R. 674, 676). As the court below in effect held (R. 875, 879), the consequence of this procedure was that petitioners accepted without challenge the Commission's findings as an adequate statement of the facts shown by the record, and of the contentions which the petitioners had made before the Commission.

In its opinion the Commission stated the major issues to be: (1) whether the structure of the Bond and Share holding company system is unduly and unnecessarily complicated, or whether voting power is unfairly and inequitably distributed among the security holders of the system; (2) if so, whether such conditions are to a substantial extent attributable to the continued existence or capital structure of petitioners or either of them; and (3) whether it is necessary to discontinue the existence of petitioners or

either of them to remedy these conditions in the manner contemplated by the statute (R. 533). The Commission decided each of these issues in the affirmative and ordered the dissolution of petitioners.

In addition, the Commission specifically rejected the following contentions of petitioners as well as others not now at issue: (1) that it should dismiss the proceedings on the ground that Section 11 (b) (2) of the Act is unconstitutional; (2) that the Commission was powerless to proceed with the hearing in this proceeding except after completion of or in conjunction with its proceeding under Section 11 (b) (1) of the Act; (3) that the Commission had not made the examination and investigation contemplated by Section 11 (a); (4) that certain evidence offered by American, bearing on valuation of assets, was improperly denied admission; and (5) that certain applications of petitioners under Section 11 (e) of the Act for approval of plans for compliance with Section 11 (b) of the Act should be consolidated with this proceeding (R. 529–533).

On August 28, 1942, the Commission denied the petitions for rehearing. Shortly thereafter, both petitioners advised their security holders that in the light of the necessity for reorganization of petitioners regardless of the orders, they intended to comply, and that they had no intention of appealing. On the 59th day after the entry of the orders, both petitioners filed their petitions

for review. These raised the various questions which had been urged before the Commission and in addition contentions not raised before the Commission.

The court below refused to consider the contentions not raised before the Commission (R. 875–876) but upon examination of all contentions it deemed properly raised, it sustained the Commission in all respects and affirmed its orders (R. 869–901).

3. *Nature of the issues raised in this Court.*

Petitioners' arguments that Section 11 (b) (2) is not a valid exercise of the commerce power are substantially the arguments which have been advanced in the *North American* case, both by North American and by petitioners as *amici curiae*. These arguments have been dealt with at length in our *North American* brief. Petitioners' further constitutional contentions as to want of due process, substantive or procedural, are interrelated with challenges to the Commission's application and interpretation of the statutory standards, to its inferences from the undisputed facts and to its choice of remedy. These contentions are also based upon what we consider wholly unfounded assumptions as to the practical consequences of the dissolution orders. For that reason we shall deal with them in our discussion of the factual basis of the Commission's findings and the considerations pertinent to its choice of remedy.

SUMMARY OF ARGUMENT

I

The Commission found that the corporate structure and continued existence of petitioners, intermediate holding companies in the Bond and Share system, unduly and unnecessarily complicate the system and unfairly and inequitably distribute voting power among the security holders of that system. The conclusion rests upon what were virtually undisputed findings of facts. Moreover the petitioners have in the past conceded that they violate the statutory standards and that reorganization or dissolution is necessary. Apart from constitutional arguments their main contention is that the remedy of dissolution is unduly drastic.

The facts demonstrate the need for action. American and Electric, it was clearly established, are means by which Bond and Share controls the subsidiaries of American and Electric through disproportionately small investment. The findings of the Commission are based on violation of the statutory standard both on the ground that petitioners unfairly and inequitably distribute voting power and on the ground that they unduly and unnecessarily complicate the structure of the Bond and Share system. That system includes by definition the petitioners and their subsidiaries.

On the score of voting power, the unchallenged figures show that Bond and Share, through American, controls the subsidiaries of American by means of an investment of approximately 3.42%

of the book value of American subsidiaries, while the holders who have contributed over 96% of the investment in those subsidiaries are disfranchised. In the case of Electric, control is exercised through ownership of securities representing only 8.72% of the book values of Electric's subsidiaries, while the holders who contributed over 91% of the book investment in those subsidiaries are disfranchised. The extent of Bond and Share's interest is subject to further diminution since these computations do not take into account the fact that the book figures reflect unconscionable writeups and inadequate depreciation.

Petitioners' challenge to the validity of the Commission's figures involves only the adjustments for such indicated writeups and depreciation. On analysis, the post-record transactions cited by petitioners substantially sustain the Commission's findings. The transactions mentioned indicate with relation to writeups that the Commission's assumptions on this score have been substantially borne out. They have no relevance to the Commission's comments as to inadequate depreciation, since the later transactions referred to do not attempt to pass on the adequacy of depreciation reserves.

American's attempt to offer valuation testimony could have no effect on the Commission's conclusion concerning inequitable distribution of voting power, since the inequity was amply demonstrated otherwise and the proposed proof, if accepted,

would have made only an insignificant difference in the figures on which the Commission based its conclusion. The Commission did not err in comparing for purposes of its analysis the securities through which Bond and Share exercised its control with the entire investment in the system. It was not required to include in its computations holdings of Bond and Share through which control was not exercised and it was not required to ignore the vast amount of the capitalization of its subsidiaries which was represented by debt securities.

The record also shows that petitioners caused major complexities in the Bond and Share system. Their sole function in the system was to serve as pyramiding and leverage devices which produced most of the major evils at which the statute was directed. The complications were present throughout the system and involved threats to the efficiency of public regulation, to the safety of investors, and to the making of rate reductions. At the levels both of petitioners and of Bond and Share, they represented particularly serious dangers to investors.

Further, there was no justification for the continued existence of petitioners. Petitioners were mere paper companies having no function whatsoever as to operating matters, all such matters being carried out by Bond and Share through its service company irrespective of theoretical ownership and control of such properties by petitioners. The petitioners have no staffs capable

of performing operating functions, whereas petitioners' subsidiaries and Bond and Share's service company have adequate staffs and in fact perform all functions with relation to operations. Moreover, petitioners serve no function with respect to financial matters. Nor have they ever served such a function in the past except the type of function which the statute condemns. The acquisition and combination of properties was accomplished by Bond and Share or by other companies, and the properties were placed in petitioners solely as a means whereby Bond and Share could sell securities to investors and recoup its own investment without losing control of the operating companies. The few occasions on which petitioners made outlays in connection with the combination of operating companies were purely transitional and the outlays were not at all in the nature of equity capital. Petitioners were of no further aid to their subsidiaries subsequent to their organization. Almost all the capital which has gone into the development of subsidiaries was supplied by the public investors in those subsidiaries. The record does not even sustain a claim that such short-term loans as petitioners made were of assistance to their subsidiaries.

II

In the light of the nature of petitioners' violation of the statutory standards the Commission found that their dissolution was "necessary to

ensure" that those violations be corrected. It found that no other approach "holds out the promise of effectuating the statute's requirements fully or promptly". Indeed, dissolution of intermediate holding companies was recognized by one of the investigators upon whom Congress relied, Dr. Walter Splawn, as perhaps the most appropriate means of achieving the legislative objectives. The Commission's choice of dissolution was an eminently fair and practical solution to a complex administrative problem. Section 11 (b) orders are not self-enforcing. They merely fix an objective toward which the company is directed to work during the period for compliance and which in default of compliance can be enforced by a court-appointed trustee. The purpose of the order is to fix the necessity for action and to avoid delay.

Dissolution is not, as petitioners urge, an injury to investors. Rather it involves the placing of investors in a sounder position by removing useless and costly intermediate holding companies. Such a process gives security holders a direct interest in the operating companies in lieu of their existing indirect interest through the stock of petitioners. The result will be beneficial to investors and will result in the correction of financial conditions which have been detrimental to consumers and to the public interest in general. In fact, the process of compliance with a dissolution order is one which impels substantial im-

provement of the financial structure of petitioners' operating company subsidiaries as well as correction of the complexities of petitioners' own structure. This process is one which has been followed with profit by National Power and Light Company, a sister holding company of petitioners. Petitioners, notwithstanding their challenge to the present orders, have accomplished a partial liquidation as a result of which they have enormously strengthened the financial position of their subsidiaries and increased their equities in those subsidiaries. Compliance with a dissolution order must be made in accordance with the "fair and equitable" standards contained in the Act, and the experience of the Bond and Share system has shown that the process is one which is in all respects beneficial to the public interest and the interest of investors and consumers, and such was the finding of the Commission.

Alternative solutions are suggested by petitioners. First, it is suggested that Bond and Share is the principal offender against the statutory standards, and that the Commission should merely have required Bond and Share to divest itself of its interests in petitioners. But irrespective of any fault of Bond and Share as the creator, it was the continued existence of petitioners, not of Bond and Share, which the Commission found to be the major instrument in the violation of statutory standards. Moreover, such an order would be only a partial solution and subject to

substantial objections on the ground that reorganization of petitioners and petitioners' subsidiaries would be an essential prelude to the creation of any type of security which Bond and Share could properly be authorized to distribute. Petitioners have also suggested that if their capital structure were corrected to the point that they did not offend against the statutory standards, and if they were limited to a single integrated system and such other properties as might be retained under Section 11 (b) (1) of the statute, dissolution would not be necessary. But there was no assurance that even after reorganization there would be any single integrated system to which it would be permissible for either of petitioners to limit itself. American has practically recognized this fact. Electric, however, claims a "Southern" system. Electric's alleged southern system originally included both the gas properties of United Gas Corporation with over $309,000,000 of book assets and the properties, chiefly electric, of other subsidiaries aggregating over $236,000,000 of book assets. On size consideration alone the Commission questioned whether such a combination of properties could be held in a single holding company system. It was by no means certain that Electric had sufficient investment in that system to be permitted to serve as an agency to keep it or any part of it together. The Commission pointed out that if a holding company was needed to keep any such

system together, nothing made Electric, a Maine corporation, superior to a specially incorporated company with a more appropriate domicile created for that purpose. It was within the discretion of the Commission to order the dissolution of petitioners, as presently offensive to the standards of the Act, rather than to order such a complete transformation as would endow them with management, appropriate function and independence, in addition to appropriate capital structures. The orders, however, in no way preclude petitioners and Bond and Share from themselves bringing about such a transformation and in that event obtaining appropriate modification of the orders. Electric's argument that every holding company is entitled to a single system ignores the applicability of Section 11 (b) (2) as well as Section 11 (b) (1). Under Section 11 (b) (2) useless, complex and unnecessary holding companies may be dissolved even though the properties on which they are erected are only a single integrated system. The Commission's choice of a remedy was a rational one designed to ensure compliance and highly salutary in its effect on investors.

Petitioners' plans filed with the Commission are no bar to a dissolution order, since they do not offer any promise of effectuating compliance with the statute by other means than dissolution. The plans were seriously incomplete and ineffective and the Commission indicated that they would

be dismissed if they were pressed. However, petitioners have not pressed these plans except to argue that they are bars to dissolution orders. In fact, the companies, no less than the Commission, have apparently regarded the plans as merely litigation strategy and have devoted their time to many other more limited proposals which have in fact been approved and consummated and have carried petitioners far along the road to compliance.

III

There is no constitutional objection to the Act as applied to petitioners. The structure of the Act has been analyzed in our North American and Engineers briefs; we have there shown that Section 11 was designed to apply only to the typical interstate holding company, and that the Court need not here be concerned lest as applied to some other company the Act might be too inclusive. That petitioners are typical interstate holding companies is clear. Indeed, petitioners have no local functions. They are exclusively instrumentalities of interstate commerce and interstate control through which Bond and Share controls a substantial part of its nation-wide system of operating companies. They reflect all the complexities and evils recited in the Act as spread by and having adverse effects upon interstate commerce. Reorganization of the financial structure of a typical interstate holding company is as closely related to the interstate commerce in which that

company is engaged as is reorganization of an interstate railroad company to the commerce in which the railroad is engaged. *Ecker* v. *Western Pacific Railroad Corp.*, 318 U. S. 448, 474. No separate problem is presented by the remedies contained in Sections 11 (b) (1) and 11 (b) (2), since they merely provide somewhat different remedies for the same evil. No objection under the due process clause can be advanced on the ground that petitioners are being subjected to "compulsory involuntary reorganization" since this sanction is common under the commerce clause in the antitrust cases. Similarly, the Act is not improperly retroactive, for it simply provides remedies for conditions which in the judgment of Congress have become intolerable. Compliance looks to the future, as in cases under the antitrust and Hepburn Acts, though the objectionable arrangements may have antedated the statute. The Act takes no property, and in fact compliance may well be highly beneficial from a financial standpoint. Section 11 is not vulnerable on the ground of undue delegation of power, since the standards set forth are clear in themselves and in the context in which they are embodied. Indeed the argument that the standards of the Act are too indefinite is somewhat strange, since petitioners' president, along with other holding company executives, urged that the most general standards be adopted by Congress and that the Commission not be placed in a "strait-jacket".

IV

Petitioners raised before the circuit court of appeals certain questions not raised before the Commission. Section 24 (a) of the Act provides that no objection to the order of the Commission shall be considered by the court unless such objection shall have been *urged before the* Commission or unless there were reasonable grounds for failure to do so. On the basis of this section the court below refused to consider those arguments and we believe properly. No reasonable ground was advanced for failure to raise the contentions before the Commission.

Of the contentions raised in the court below and not raised before the Commission, petitioners now urge only that the Act does not grant the Commission the power in any case to order the dissolution of a holding company. The language of the statute clearly gives the Commission authority to terminate the business of holding companies and to order their elimination. Section 11 (b) (2) gives the Commission power to require any action, including that of dissolution, which it finds "necessary to ensure" conformity to its standards. Petitioners argue that elision of an earlier reference to "dissolution" means the withdrawal of the power to dissolve. But the substitution of the present very general language of Section 11 (b) (2) indicates unmistakably that it was intended to broaden rather than limit the Commission's power. In fact the Commis-

sion has consistently and without question exercised the power of ordering dissolution in the case of a number of major holding companies, including National Power and Light, petitioners' sister company. If petitioners are nevertheless entitled to a ruling on this contention it should be by this *Court, and not by remand which* would result in further delay.

ARGUMENT

I

THE COMMISSION PROPERLY FOUND THAT THE CORPORATE STRUCTURES AND CONTINUED EXISTENCE OF PETITIONERS UNDULY AND UNNECESSARILY COMPLICATE THE STRUCTURE OF THE BOND AND SHARE SYSTEM AND UNFAIRLY AND INEQUITABLY DISTRIBUTE VOTING POWER AMONG THE SECURITY HOLDERS OF THAT SYSTEM

The Commission's conclusion that the corporate structure and continued existence of petitioners unduly and unnecessarily complicate the Bond and Share system and unfairly and inequitably distribute voting power among the security holders of that system rests upon what is virtually an agreed statement of facts set forth in the Commission's opinion.[19] An examination of those facts in the light of

[19] The failure of petitioners to question in the administrative proceeding the factual basis for the Commission's finding makes wholly unwarranted American's criticism of the court below for alleged lack of "dispassionate consideration to the questions presented" which American purports to derive from the fact that the opinion below contained copious quotations from the "heated declarations of the S. E. C." (Amer. Brief, p. 20). By the same token Electric's reference to "the shocking extent to which the 'facts' respecting Electric are misstated by the Commission's opinion" implies

the standards of the Act will, we submit, establish the accuracy of the Commission's conclusions. As we have noted above, those conclusions were severally applicable under the statutory definition of "holding company system" both to the Bond and Share system in its entirety and to the major segments of that system constituting the American and Electric systems.

It is not clear that petitioners seriously dispute the findings that they violate the statutory standards. At most, they attempt to show through various challenges to the Commission's analysis that it overstated the degree of their offensiveness. But their own statements concede the necessity for drastic reorganization. In their brief in *Electric Bond and Share Co.* v. *Securities and Exchange Commission,* 303 U. S. 419, it was stated (p. 110) that "the Act directs the Commission to require all the major holding company defendants (with the possible exception of

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a shocking lack of diligence on the part of petitioners and their counsel in failing to call any inaccuracies to the attention of the Commission, if there were in fact any misstatements (Electric Br. p. 39). We show below, however, that the purported illustration of misstatements involves nothing more than an argument based upon the fact that the Commission did not later require subsidiaries of petitioners to increase depreciation reserves to the amount claimed for tax purposes. This is argued to evidence inaccuracy in a tabular statement and other computations (not disputed before the Commission or now) showing the difference between depreciation which petitioners recorded on their books and reports to security holders and depreciation claimed for income tax purposes. (See *infra*, p. 56–59.)

American Gas) to reorganize or dissolve." In their answers to the complaint in that case petitioners recognized that if constitutional, Section 11 left them "no alternative but to dissolve". Comm. Ex. 69 (Vol. 1, p. 177). Their own "plans", which loom so large in the present argument (see Amer. Br. p. 101–107; Elec. Br. p. 27–31), recognized before the entry of the Commission orders the necessity for substituting a single class of stock for their existing complex stock structures[20] and, although the plans are somewhat vague on this point, for substantially

[20] The petitioners recognized the impossibility of continuing with their present structures in their statements concerning their Section 11 (e) plans. American's plan states (R. 415):

"It is not the purpose here to raise any technical or disputed questions as to the legal interpretation of these statutory provisions [Sections 11 (b) (1) and 11 (b) (2)]. They have not yet been authoritatively construed by the courts, and the Commission itself has not definitely exhausted the field of interpretation. The Commission has instituted against American Company proceedings under both Sections 11 (b) (1) and 11 (b) (2), upon charges that the present system violates these requirements of the Act. *Without weighing these charges, it is obvious that American Company will be required to readjust its capital structure, and divest itself of control of a number of its important subsidiaries.*" [Italics added.]

Electric's plan states (R. 496):

"*In order to comply with Section 11 (b) (2) of the Act*, it is proposed that the existing classes of capital stock of Electric (including the $7 Preferred Stock, the $6 Preferred Stock, and Second Preferred Stock, Series A ($7), including arrearages, and the Common Stock) be replaced by a single class of stock * * *." [Italics added.]

eliminating their debt. They recognized, in addition, that Section 11 (b) (1) would require disposition of many of their scattered operating companies in order to limit them to a single integrated system and retainable additional systems. After the instant orders were entered petitioners advised their security holders that they did not intend to appeal in view of the necessity for reorganization, regardless of the orders.

The main thrust of petitioners' argument is that the remedy which the Commission adopted was too harsh. They argue strenuously that the Commission was under an obligation to bring about a transformation which would leave them with appropriate capitalizations and holdings, and with a management of their own free of Bond and Share control, rather than adopt what they term the drastic remedy of dissolution. We shall show below that apart from metaphor their argument rests on nothing more than a distinction between (1) continuing with the existing Maine corporations and (2) utilizing newly organized corporations with appropriate domicile and capital structures as vehicles for maintaining common control over any combinations of operating companies which need a parent holding company to tie them together as an integrated system.[21] In fact, the real difference

[21] Both petitioners' plans recognized the possibility of using newly incorporated holding companies rather than the existing entities to hold control over permissible combina-

between what is required by the Commission's order and petitioner's own proposals is that the Commission by entering its orders required action, whereas petitioners were seeking to defer any requirement for action pending further hearings and discussions predicated upon only a vague promise of subsequent voluntary amendments by which their plans might become concrete. We shall show below in Point II that the circumstances presented by the record compelled the action which the Commission took.

Since these determinations by the Commission were made in the light of its findings concerning complexity and inequitable distribution of voting power, and since petitioners do in some respects challenge those conclusions, we believe it advisable to examine first the basis for the Commission's finding that petitioners in fact violated the statutory standards.

A. *The corporate structures and continued existence of American and Electric unfairly and inequitably distribute voting power in the Bond and Share system*

In reaching its determination that Bond and Share's voting control of the subsidiary operating companies rests on inequitable distribution of vot-

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tions of operating companies (R. 400–401, 432, par. 59; 503 fourth paragraph). Even the relatively minor expense of a new charter may be avoided in the event of a change of circumstances pointing to an appropriate use for the existing corporate entities.

ing power, the Commission had as a guide the Congressional declaration in Section 1 (b) of the Act that the national public interest and the interests of investors and consumers are adversely affected "*when control of such companies is exerted through disproportionately small investment.*"[22] [Italics supplied.] The facts set forth in the Commission's opinion clearly demonstrate that the investment through which control[23] is exercised at various levels in the Bond and Share holding company system is "disproportionately small" to that of the public investors in petitioners and in their subsidiaries, and "disproportionately small" to the properties controlled. The facts also show that the existence and corporate structures of petitioners were important factors in making possible this disproportion between the investment representing control and the aggregate of properties controlled. These facts are summarized below with respect to each petitioner.

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[22] Other evils described in Section 1 (b) which are singularly exemplified by Bond and Share's creation and use of petitioners are those which occur "when such securities are issued upon the basis of fictitious or unsound asset values having no fair relation to the sums invested in or the earning capacity of the properties and upon the basis of paper profits from intercompany transactions, or in anticipation of excessive revenues from subsidiary public-utility companies" (see *infra*, pp. 73–75).

[23] We have pointed out in note 8, p. 6, *supra*, that there is no question that control by Bond and Share over the petitioners and control by petitioners over their subsidiaries is complete. For a graphic portrayal of the channels through which Bond and Share controls its system, see Appendix D, *infra*.

American

In round numbers, American has an aggregate capitalization of $270,000,000 (at December 31, 1941). This consists of $46,000,000 of debentures, $177,000,000 of preferred stock, and $47,000,000 common stock and surplus. Since the arrearages of preferred stocks amount to $35,000,000, adjustment for these arrearages leaves a net equity for the common stock of only $12,000,000. On this basis the debentures and preferred stocks represent over 95% of the capitalization, whereas the common stock represents less than 5%.[24] Nevertheless, the common stock has over 62% of the voting power; and Bond and Share, through its ownership of 31% of American's common and 3% of its preferred, holds 20.7% of the total voting

[24] The following table sets forth the capital and surplus of American and the voting power of its securities by classes at December 31, 1941 (R. 537, 631):

	Stated value	Stated value adjusted for dividend arrearages		Votes per class	
		Amount	Percent of total	Number	Percent of total
Debentures	$45,849,000	$45,849,000	16.9	None	
$6 preferred stock	79,300,926	79,300,926	35.7	793,581	16.6
Dividend arrearages		17,319,338			
$5 preferred stock	97,844,400	97,844,400	42.8	978,444	20.5
Dividend arrearages		17,795,450			
Common stock	37,434,351	12,384,497	4.6	3,008,511	62.9
Capital surplus	36,026				
Earned surplus	10,028,908				
Total	270,493,611	270,493,611	100.0	4,780,536	100.0

power (R. 537–538, 614), which, as above noted, has proved sufficient for complete domination.[25]

Bond and Share's holdings in American have a total book value (including surplus and after adjustment for arrearages on preferred stocks) of $9,966,795, which amounts to 3.68% of American's total capitalization of $270,493,611. American in turn through its holdings, principally in the common stock of subsidiaries, has an interest amounting to approximately 41.67% of the total capital and surplus of the subsidiaries per books (R. 663). The total capitalization of the 21 subsidiaries of American equals $729,143,155 (R. 619).

Thus, Bond and Share, through the ownership of securities of American having a book value of less than $10,000,000, equal to 3.68% of American's capitalization (R. 663), controls not only American with its capitalization of $270,000,000, but also all the subsidiaries of American, having an aggregate capitalization of $729,000,000 (R. 619).[26] Bond and Share's $10,000,000 represents only 1.34% of the total. In other words, these figures establish a ratio of one dollar of Bond and Share investment to twenty-seven dollars of total investment at the

[25] For the six-year period 1935–41 the votes cast by Bond and Share through these securities averaged 37% of all votes cast at all stockholders' meetings (R. 617), and control by Bond and Share was specifically admitted by American's President (R. 279). See note 8, *supra*.

[26] The consolidated assets of American and its subsidiaries at December 31, 1941, were carried at $851,251,525 (R. 540).

subholding company level of the pyramid which fans out to a ratio of 1 to 73 at the base. Thereby $10,000,000 controls $729,000,000.

The Commission made alternative computations which gave petitioners the benefit of a more favorable assumption—it adjusted upward the book figures for the common stock interest in American to reflect the amount by which the values on the books of the subsidiaries exceeded corresponding values at which American carried its stock interest in those subsidiaries. Even after such adjustment Bond and Share would own only 8.2% of the capitalization of American (R. 663). Since, as we have seen, American controls its subsidiaries through an investment of approximately 42%, Bond and Share, through its control of American, controls all of American's subsidiaries by means of an investment which with these upward adjustments is only 3.42% (42% x 8.2%) of the book values of American's subsidiaries.

Electric

In round numbers Electric's aggregate capitalization (as at December 31, 1941) is $192,000,000. This consists of $30,000,000 of debentures, $85,000,000 of preferred stock and $77,000,000 of common stock and surplus. Since the arrearages of preferred stock amount to $50,000,000, adjustment for these arrearages leaves a net equity for the common stock of only $27,000,000. On this

basis the debentures and preferred stocks represent over 85% of the capitalization, whereas the common stock represents less than 15%.[27] Nevertheless the common stock has over 80% of the voting power; and Bond and Share, through its ownership of 57.3% of Electric's common stock[28] holds 46.8% of the total voting power of all Electric's securities (R. 544), which has proved sufficient for complete domination of Electric.[29]

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[27] The following table sets forth the capitalization and surplus of Electric and the voting power of its securities by classes as at December 31, 1941 (543–544, 631):

	Stated value*	Stated value adjusted for dividend arrearages		Votes per class	
		Amount	Percent of total	Number	Percent of total
Debentures	$30,380,000	$30,380,000	15.8	None	
$7 preferred stock	51,416,200	51,416,200	43.4	514,162	12.2
Dividend arrearages		32,092,278			
$6 preferred stock	25,543,067	25,543,067	20.4	255,430	6.0
Dividend arrearages		13,665,308			
$7 second preferred stock	7,518,900	7,518,900	6.6	None	
Dividend arrearages		5,131,649			
Common stock	70,462,863	26,442,376	13.8	3,452,287	81.8
Earned surplus	6,868,838				
Total	192,189,868	192,189,868	100.0	4,221,879	100.0

*The various classes of stock are not segregated as to amounts in the capital stock account of the company. The preferred stock is here assigned its liquidating value of $100 per share (except for arrears) and the balance of the capital stock account is assigned to the common stock. Reacquired shares are eliminated.

[28] In addition, Bond and Share owns an insignificant amount (485 shares) of Electric's 7% preferred stock and 13,905 shares of the nonvoting second preferred stock (R. 544).

[29] For the six-year period 1935–1941 the votes cast by Bond and Share at all stockholders' meetings through these securities averaged 75% of all votes cast (R. 617). See note 8, *supra*.

Bond and Share's direct holdings in Electric represent a total book equity (including surplus and after adjustment for arrearages on preferred stocks) of $17,558,108, which amounts to 9.14% of Electric's total capitalization of $192,189,868 (R. 544). Electric in turn, through its holdings, principally in the common stock of subsidiaries, has an interest amounting to approximately 39.21% of the total capital and surplus of the subsidiaries. The total capitalization of the 11 direct and 11 indirect subsidiaries of Electric equals $654,000,000. (R. 622.) Thus, Bond and Share, through the ownership of securities having a book value of slightly over $17,500,000 equal to 9.14% of Electric's capitalization, controls not only Electric with its capital of $192,000,000 but also all the subsidiaries of Electric having an aggregate capitalization of $654,000,000 (the consolidated capitalization of Electric and its subsidiaries is $749,183,549, R. 547, n. 20). Bond and Share's $17,500,000 interest equals only 2.6% of the total. In other words, these figures establish a ratio of 1 to 11 at the subholding Company level of the pyramid which fans out to a ratio of 1 to 37 at the base. Thereby $17,500,000 controls $654,000,000.

The Commission's alternative computations, as in the case of American, gave Electric the basis of a more favorable assumption which adjusted upward the book figures for the common stock in-

terest in Electric to reflect the amount by which the values on the books of the subsidiaries exceeded corresponding values at which Electric carried its stock interest in those subsidiaries. Even after such adjustment Bond and Share would own only 22.25% of the total capitalization of Electric. Since, as we have seen, Electric controls its subsidiaries through an investment of 39%, Bond and Share through its control of Electric controls all of Electric's subsidiaries by means of an investment which, with these upward adjustments, is only 8.72% (39% x 22.25%) of the book value of Electric's subsidiaries. (R. 666.)

These facts alone are sufficient justification for the Commission's conclusion that the existence and corporate structure of American and Electric unfairly and inequitably distribute voting power in the Bond and Share system and its opinion so states (R. 621–622, 624).

Write-Ups and Depreciation

In fact, however, the picture is even worse. Although the book figures of the system demonstrated plainly that the distribution of voting power was not consistent with the requirements of the statute, the record made it abundantly clear that the book figures themselves were seriously overstated because they reflected unconscionable

write-ups [30] and inadequate depreciation.[31] These facts being before the Commission, it could hardly ignore their existence and seemingly endorse the accuracy of the book figures by overlooking the obvious defects which the evidence brought out.

Petitioners attempt to argue that the Commission's opinion is based solely on the computations

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[30] The Commission found that the practice of inflating the accounts of the Bond and Share system companies was not occasional or sporadic, but was almost routine. The Commission stated (R. 601–603):

"We have already described the financial pattern employed by the subholding companies (under Bond and Share's aegis) in setting up those operating companies which represented an amalgam of smaller units. Through systematically writing up the property accounts of the reorganized operating companies and causing them to issue to the subholding companies securities in amounts greatly exceeding the latter's cost, the subholding companies were enabled to recover all costs incurred in the process of combination as well as the greater portion, if not all, of their initial cost of acquiring control. The record presents this pattern stamped with a most monotonous regularity on each of the subsidiaries organized by American and Electric, as we previously found to be the case in National. We do not believe it is necessary to cumulate the details of each instance; a glance at Appendices E–2 [R. 665] and F–2 [R. 667] of this Findings and Opinion demonstrates that each of the subsidiaries formed by either subholding company bears on it the deformities resulting from this type of birth, in the form of inflated plant accounts and overcapitalized structures."

[31] The Commission found that this inadequacy was attributable largely "to the insistent demands of their holding company parents for payment of the largest possible amount of dividends" (R. 603, n. 107).

made after adjustment for write-ups and depreciation. They place emphasis on the use by the Commission of reference to the "foregoing figures" (Am. Br., pp. 92, 93; Elec. Br., pp. 39–43). However, examination of the opinion (R. 619–624) shows that the Commission's findings are the result of examination of numerous sets of figures rather than any single group and that the greatest emphasis is placed on the figures *before* adjustment for write-ups and depreciation. Indeed those are the figures mentioned immediately before the Commission's conclusion that "on the basis of the foregoing figures," voting power was unfairly and inequitably distributed (R. 621–623, 624).

When adjustment is made solely for the apparent write-ups in their subsidiaries, American's share in the capitalization of its subsidiaries shrinks from 41.7% to 21.4% and Electric's shrinks from 39.2% to 32.7% (R. 663, 667).[32] Bond and Share's interests in American and Electric are in turn correspondingly reduced. Consequently Bond and Share's interests in the operating subsidiaries through its ownership of American and Electric's securities become much more attenuated than is indicated by the figures of 3.42% and 8.72% based on the books without adjustment. If

[32] Since proceedings were pending before the Commission with respect to United Gas Corporation, figures on write-ups in that subsidiary of Electric were not included in the Commission's computation (R. 623, n. 136).

the depreciation reserves of the subsidiaries are further adjusted to bring such reserves into accord with depreciation claimed or allowed for federal income tax purposes, the interests of American and Electric in the adjusted capitalization of their respective subsidiaries and the interests of Bond and Share in American and Electric are all substantially reduced again. Thereby the disproportion between investment and control by Bond and Share over the subsidiaries of the subholding companies is further accentuated.

Appendices E–2 and F–2 to the Commission's findings (R. 665, 667) show in the case of the American and Electric systems, respectively, the book assets and capitalization of each subsidiary with adjustment for indicated system write-ups and a separate adjustment which shows the effect which would be realized by utilizing depreciation claimed for income tax purposes in lieu of that shown on the books. In view of petitioners' present challenge both to the relevance and reliability of these figures it is important to note the use made of them by the Commission. While, as we noted above, inequitable distribution of voting power and undue complexity existed on the basis of book figures alone, it was a matter of aggravation that the book figures were grossly in excess of actual investment. Moreover, as we note below, it was relevant to the choice of remedy that many of petitioners' subsidiaries would probably have to be

recapitalized for business reasons as well as to meet requirements of the Act. The problems before the Commission, however, did not then require a complete and definitive revision of the accounts of each subsidiary or a depreciation study of the properties of each subsidiary, either of which would have prolonged the hearing out of all proportion to any further light that would have been shed upon the issues in the instant case.

With respect to the relevance of depreciation claimed for income tax purposes, the Commission noted that for the subsidiaries of American the aggregate difference between book reserves and that claimed for tax purposes was $94,800,000 (amounting to over 10% of total book assets), but added that "concededly this is not to be deemed a conclusive figure." The Commission also referred to published studies of the Public Utilities Division comparing depreciation policies on an industry-wide basis from which it appeared that out of the entire group of 30 holding company systems included in the study "book accruals for depreciation were smallest relative to depreciation for tax purposes in the case of the subsidiaries of American." (R. 620, n. 132.) It also noted instances where depreciation accruals were materially reduced after acquisition by American (R. 603, n. 107). In the case of Electric the Commission noted that the aggregate difference between depreciation per books and depreciation for income tax purposes is approxi-

mately $121,000,000, again adding that this was not deemed a conclusive figure and that approximately $80,000,000 of the amount is applicable to United Gas Corporation "as to which special tax provisions regarding gas production properties may make somewhat less appropriate the comparison between book figures and tax figures" (R. 623, n. 137).[33]

American offers a post-record challenge to the validity of these figures based on the fact that in subsequent proceedings with respect to certain of these subsidiaries the Commission failed to compel adjustments in book provisions for depreciation to bring book depreciation reserves up to the income tax figures (Amer. Br., footnote p. 92).[34]

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[33] Under the tax laws straight-line depreciation is used. This is an accepted method of accounting for depreciation in the utility field. See *Telephone and Railroad Depreciation Charges*, 118 I. C. C. 295–411 (1926), and 177 I. C. C. 351–500 (1931). The "retirement" method which petitioners' subsidiaries have followed through most of their history was abandoned by the National Association of Railroad and Utilities Commissioners in 1938. See *Uniform System of Accounts for Electric Companies* prescribed by Federal Power Commission, General Instructions No. 10 and Definition No. 13; Securities and Exchange Commission Rule U-27; *Public Utility Regulation*, Mosher and Crawford (1933), p. 155, and *Public Utility Economics*, Thompson and Smith (1941), pp. 335–36.

[34] We deal below with Electric's claim that the facts regarding it were misstated by the Commission's opinion (see *infra*, pp. 55–59), and show in that connection that Electric is in reality only making the point referred to in the text, although this may not be apparent upon first reading of the discussion at pages 39 to 42 of its brief.

In none of the proceedings referred to did the Commission purport to approve the adequacy of the reserve for depreciation as stated after giving effect to the transactions under consideration.[35] Moreover, the Commission has taken the position with respect to depreciation, generally, that it favors application in the future of straight-line depreciation related to estimated useful life of the properties involved, but because of the practical obstacles involved it does not favor a general requirement which would compel readjustment of existing depreciation reserves to the amount which would be indicated by applying such computations to prior years.[36] Thus, while the Commission did not purport to make a depreciation

[35] In the only one of the cases cited by American which specifically mentions adequacy of the resulting reserve the Commission said:

"While the record in this case indicates that a reserve of this size probably does not reflect the actual depreciation sustained on Florida's property, considering all the circumstances of the case, including present and stated probable future policy of the company with respect to depreciation appropriations from income, the estimated amounts of property to be constructed and retired during the next several years, and the resultant anticipated substantial increase in the reserve, we can accept the present reserve as adjusted as not so unreasonable as to require further action on our part." *Florida Power & Light Company*, — S. E. C. — (1943), Holding Company Act Release No. 4791, at p. 20.

[36] See Statement of Ganson Purcell, Chairman, Securities and Exchange Commission, before the Committee on Depreciation of the National Association of Railroad and Utilities Commissioners (Chicago, Ill., March 8, 1944), printed as Appendix E to this brief. Alleged unfairness of retroactive application of straight-line depreciation for rate making

study of petitioners' subsidiaries, we believe it was entitled to attach some relevance for purposes of analysis to the income tax figures, particularly where the discrepancies were relatively high as compared to the rest of the industry. Inadequacy of depreciation reserves was in any event only a cumulative point in view of the conclusions drawn from book figures alone—and the indications of the substantial write-ups.[37]

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purposes has been of major concern to the electric and gas industry. See a review by Ralph J. Baker of *Financial Accounting* by George O. May, 58 Harv. L. Rev. 886, 893. Whatever the outcome of this dispute in relation to permissible rates, investment analysis cannot overlook deficiencies in past depreciation accruals.

[37] Petitioners quarrel with the theory on which the Commission computed net investment in all their subsidiaries, deducting minus figures shown for particular subsidiaries (Amer. Br. p. 94; Elec. Br. p. 42). Petitioners argue that all minus figures should have been disregarded and only the sum of the positive figures given. This point was not urged before the Commission and petitioners do not now undertake to show the extent that using their method would require revision in the Commission's computations. Reference to the tables in Appendices E–2 (R. 665) and F–2 (R. 667) shows that minus figures do not become significant until we reach column (13) which shows deductions both for indicated write-ups and to conform to tax depreciation. Thus in the case of American the aggregate investment in its subsidiaries less indicated write-ups is shown in column 8 as $115,759,914. Adding back $737,402, the only minus figure, would increase this amount by less than 1%. In the case of Electric's subsidiaries the total for column 8 of Appendix F–2 is $193,301,010. Adding back the only minus figure ($5,977,785) increases the total by about 3%. In the case of column 13 application of petitioner's method of computation would make substantial differences in the totals but would still leave both American and Electric with

In the case of write-ups the analysis which the Commission made was more complete, although again it did not purport to be sufficiently definitive to determine precisely what items would have to be charged to Account 107 in the applicable systems of accounts.[38] As appears to be conceded

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insignificant investments in proportion to the total assets of the subsidiaries. Lest the Court gain the impression, however, that there is any merit in these contentions, it may be pointed out that petitioners are confusing the process of determining system *investment*, which was the Commission's task, with the process of *equity evaluation*—which is irrelevant now, although it may be pertinent at a later time when allocations are involved. Cf. *Commonwealth and Southern Corporation* v. *S. E. C.*, 134 F. 2d 747, 754 (C. C. A., 3). In determining *investment* in the Bond and Share *system* which is owned and operated as an entity it was certainly not error to arrive at a *net* figure rather than merely adding all the plus figures. System control over the subsidiaries in which there was no investment was no less complete than in other instances.

[38] The Federal Power Commission system of accounts which was before this Court in *Northwestern Electric Company* v. *Federal Power Commission*, 321 U. S. 119, is substantially the same as that adopted by most state commissions pursuant to the recommendations of the National Association of Railroad and Utility Commissioners. The Securities and Exchange Commission has made applicable the same accounting classifications to subsidiaries of registered holding companies not otherwise subject to accounting regulation. Under this system Account No. 100.5 includes excess of cost in an arm's-length purchase over "original" cost, while Account No. 107 includes both upward revisions based on nothing more than an appraisal and upward revisions reflecting prices paid in a transaction between affiliate companies. See Kripke, *A Case Study in the Relationship of Law and Accounting: Uniform Accounts 100.5 and 107*, 57 Harv. L. Rev. 433, 436–438 (1944). The Commission made no adjustment for items classifiable

by American, petitioners made no direct effort to refute the facts brought out in the cross-examination by the Commission's staff "seeking to show 'write-ups' of capital accounts." They attempted only to show that book figures could be justified by opinion testimony as to present values, depreciation and earnings (Amer. Brief, p. 11). We discuss below, pp. 63–65, this rejected testimony which was offered at the close of the hearings. In the light of this record, involving as it did an analysis of accounting reports and transcripts of accounting entries which respondents themselves supplied

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in 100.5, although it called attention to their existence in "large amounts" (R. 621, 623). American complains of the adjustments for Account No. 107, contending that these are not, however, write-ups "as understood by accountants" (Amer. Br. footnote p. 91). Actually they are precisely what is thus understood, and as understood, condemned by all regulatory bodies. What occurred generally was a determination of the amount of securities which Bond and Share hoped to be able to sell to the public to recoup its expenses and thereafter an arbitrary statement of the value of assets in order to cover such securities. In most cases the write-ups did not even carry the pretense of being based upon any scientific attempt to evaluate either income or replacement value. (R. 559, n. 50.) For example, the original book entries of United Gas were determined upon by Bond and Share counsel acting as directors of United Gas. These figures were later written down by $130,000,000 on the basis of an appraisal, but only after public sale of United Gas securities. *United Gas Corp., et al.*, — S. E. C. — (1944), Holding Company Act Release No. 5271, at pp. 27–28. The Commission, therefore, did not use the term "write-up" carelessly or without consideration of what actually occurred, but used it to designate arbitrary and unjustifiable inflationary accounting practices.

pursuant to Commission request,[39] it is clear that the Commission was not dealing with pure "assumptions" and "guesses", as claimed in Electric's brief (pp. 39–40), when the Commission referred to "the apparent system write-up in each of these companies, as indicated in the present record" (R. 619 applicable to American, R. 623 applicable to Electric). When respondents, having been shown the findings, stipulated that they waived, among other things, further exceptions to the findings and opinion of the Commission or the filing of briefs and oral argument, the Commission was entitled to assume that respondents were not disputing the approximate accuracy of the indicated write-ups as bearing on overall system investment in the subsidiaries referred to.[40]

Nor have subsequent events, as petitioners would have the Court believe, cast any doubt upon

[39] For illustration of the kind of admissions upon which the Commission's findings of approximate write-ups are based, see R. 761–791 dealing with Florida Power & Light Company.

[40] Purely by way of illustration the Commission's findings referred to the following concrete transactions in which write-ups occurred: (a) In the American system—Kansas Gas and Electric Company, more than $2,500,000 (R. 559, n. 49); Florida Power & Light, approximately $30,000,000 (R. 605, n. 111); Texas Power & Light Company, $19,000,000 (R. 571, n. 70); (b) In the Electric system—Utah Power & Light Company, approximately $32,300,000 (R. 571, n. 70); Arkansas Power & Light Company, Louisiana Power & Light Company, and Mississippi Power & Light Company, a total of $34,700,000 (R. 585, n. 89). These separate transactions would not necessarily include all write-ups for the company in question.

the adequacy of the write-up figures for the purposes the Commission then had in hand. Petitioners' efforts to discredit Appendices E–2 and F–2 are aimed exclusively at the calculations in column 13, showing the effect on petitioners' interest in the book capitalization of their subsidiaries of deducting both the indicated write-ups and the difference between depreciation claimed for income taxes and per books. See Elec. Br. pp. 40–42, Amer. Br. pp. 95–96. Petitioners point to a number of subsequent transactions in which accounting adjustments were required or passed on by the Commission or other regulatory authorities as a result of which petitioners emerged with securities having a book value substantially in excess of what the Commission said would result from making both adjustments. Since, however, the transactions referred to did not purport to pass on the adequacy of the resulting depreciation reserves, such transactions are useful only to check the accuracy of the Commission's computations concerning the indicated write-ups. As such they fully substantiate the accuracy of the Commission's figures as indicating both that write-ups were substantial and the approximate amounts thereof.

Thus Electric compares (Br. p. 40) a subsequently achieved book equity in Idaho Power Company of $9,929,000 with the Commission figure of $5,633,794. But the latter figure, taken from Appendix F–2 column 13 (R. 667) reflects

adjustment of $3,418,300 for depreciation and $9,523,401 for indicated system write-ups (see column 6 of Appendix F–2). In fact, the write-downs in plant account subsequently made by Idaho aggregated $9,562,633, a difference of only $39,000 from the indicated write-up assumed in the opinion. Electric's purported discrepancy in figures reflects substantially the fact that the depreciation adjustments shown in the opinion were not required to be effected in the subsequent transactions. The situation is almost identical in all the other companies mentioned, and to avoid repetition we include at pages 60–61 a table showing the amounts of the indicated system write-ups set forth in the Commission's opinion and the actual write-down in plant account subsequently made by the companies in question. The table includes all subsidiaries of both Electric and American whose property accounts have been the subject of definite orders.[41] In addition, in order to show the relative significance of any variations, we

[41] The findings as to United Gas Corporation, mentioned by Electric (Elec. Br., p. 40), made no adjustment whatever for indicated write-ups since the matter was then pending before the Commission in a proceeding relating to *United Gas* (R. 587, 623 n. 136, 667 n. 6). Furthermore, the adjustment made on the basis of tax depreciation was regarded by the Commission as somewhat less relevant in the case of the gas production properties held by United than would be the case in dealing with an electric or gas plant account (R. 623). Cf. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591. In the subsequent reorganization of United Gas, the Commission did not determine either

have set forth the amount which the two figures represent as a percentage of the book figures of the company before adjustment for write-ups.

Nor is it indicative of inaccuracy in the Commission's figures that some of the subsequent transactions have resulted in realization, through sales, of sums substantially in excess of book values as adjusted for indicated write-ups, to say nothing of such further adjustments as might be necessary with respect to depreciation. Where the Commission passes on the price at which such interests may be sold, it has limited its regulatory functions to insistence upon arms' length dealings and adequate disclosure to possible purchasers, and has not prevented the vendor holding companies from realizing the sums substantially in excess of book value when obtainable.[42] Sales to public authorities are exempt from Commission scrutiny under the Act and its rules, and in the case of the

what depreciation reserve would be adequate or the amount of the write-ups in the plant account. However, the new balance sheet contained a reserve plus a frozen surplus account in the aggregate amount of approximately $40,000,000 which the Commission noted would be available for such write-downs as might be required. *United Gas Corporation*, — S. E. C. — (1944), Holding Company Act Release No. 5271. The table did show the undisputed figures as to the amount of the discrepancy between book and tax depreciation reserves.

[42] For a relatively extreme instance see *Public Servic Company of Colorado*, — S. E. C. —, (1943), Holding Company Act Release No. 4699 and see the dissenting opinion in that case.

Comparison of write-ups cited in Commission opinion with write-ups subsequently ordered to be disposed of or reserved for by subsidiaries of American and Electric [1]

	(1) Amount of write-up	(2)	(3) Percent relationships to book interests shown in columns 3 of appendices E-2 and F-2 of write-ups shown in—		Source of information concerning disposition orders
	Indicated in Commission opinion	Ordered to be disposed of or reserved for	(1)	(2)	
Subsidiaries of American:					
Florida Power & Light Company	[2] $36,883,684	[2] $31,453,494	63.1	53.8	Holding Company Act Release No. 4791—File No. 70-403.
Kansas Gas and Electric Company	1,846,194	[3] 2,987,819	21.6	34.9	Federal Power Commission Release No. 2468.
Minnesota Power & Light Company	22,055,786	[4] 21,762,087	87.1	86.0	Holding Company Act Release No. 5850 File Nos. 54-101 and 59-75.
The Montana Power Company	57,000,000	[5] 46,891,597	77.1	63.4	Holding Company Act Release No. 5897—File No. 70-1094.
Nebraska Power Company	5,866,453	[6] 5,950,072	64.5	65.5	Federal Power Commission Release No. 2555.
Northern Power Company	273,067		37.0		Holding Company Act Release No. 4220—File No. 70-675.
Northwestern Electric Company	3,500,000	3,500,000	47.5	47.5	Federal Power Commission Order 12/6/40—Docket IT-5642—Aff'd. 321 U. S. 119.
Pacific Power & Light Company	4,164,728	[7] 4,609,674	36.0	39.9	Federal Power Commission Orders 10/27/42 and 11/24/42.
Superior Water Light and Power Company	1,255,626	1,000,000	33.5	26.7	Holding Company Act Release No. 4220—File No. 70-675.
Texas Electric Service Company	33,014,107	[8] 34,399,786	102.3	106.6	Holding Company Act Release No. 5472—File No. 70-1041.
Texas Power & Light Company	19,000,000	[9] 20,482,307	65.8	70.9	Holding Company Act Release No. 5798—File Nos. 70-1069 and 70-1070.
The Washington Water Power Company	2,117,765	[10] 3,633,338	6.9	11.8	Federal Power Commission Release No. 2517.
Total Subsidiaries of American	186,977,410	176,650,174	64.3	60.7	
Subsidiaries of Electric:					
*Arkansas Power & Light Company	3,875,244	[11] 3,614,559	25.4	23.7	Holding Company Act Release No. 5294—File No. 70-953.
Idaho Power Company	9,523,401	9,562,633	51.4	51.6	Holding Company Act Release No. 4494—File Nos. 70-752 and 70-753.
*Louisiana Power & Light Company	9,632,602	[12] 7,637,203	85.5	67.8	Holding Company Act Release No. 4977—File No. 70-785.
*Mississippi Power & Light Company	6,753,234	[13] 9,212,172	70.7	96.7	Holding Company Act Release No. 4888—File No. 70-843.
New Orleans Public Service Company, Inc.	452,010	[14] 8,827,065	2.2	42.2	Registration Statement—File No. 2-5411, footnote 1 to balance sheet.
Utah Power & Light Company	31,954,713	[15] 33,563,981	123.0	129.2	Federal Power Commission Release No. 2500.
Total Subsidiaries of Electric	62,170,604	72,417,613	61.3	71.4	
Cumulative Total Subsidiaries of American and Electric.	249,148,014	249,067,787	63.5	63.5	

[1] Included in this comparison are only those subsidiaries whose property accounts have been reviewed by regulatory bodies having jurisdiction and concerning which accounts definitive orders have been issued.

[2] Subsequent to organization of Florida but prior to recapitalization as at Oct. 31, 1943, $4,270,135 of additional write-ups were eliminated.

[3] Exclusive of additional amounts of $287,507 whose disposition is being held in suspense and $184,039 previously eliminated.

[4] Exclusive of an undetermined amount to be classified subsequently and representing intrasystem profits on fees paid to affiliates in the gross amount of $1,306,148.

[5] Elimination of this amount was required by a Federal Power Commission order which is in litigation, but $28,600,000 has been eliminated as required by Montana Public Service Commission and Montana has created a reserve in excess of the balance in litigation.

[6] Proposed by company in filing submitted to Federal Power Commission. Exclusive of capitalized intrasystem profits on fees paid to affiliates estimated not to exceed $900,000.

[7] Exclusive of additional amounts to be classified subsequently and representing capitalized intrasystem profits on fees paid to affiliates.

[8] As at Dec. 31, 1941. Of this amount $2,225,236 was eliminated prior to Dec. 31, 1944, at which time the balance of $32,174,550 was reserved for or eliminated.

[9] As at Dec. 31, 1941. Of this amount $1,360,000 was eliminated prior to Feb. 28, 1945, at which time the balance of $19,122,307 was reserved for or eliminated.

[10] Exclusive of additional items aggregating $85,250 held in suspense.

[11] As determined by the Department of Public Utilities of Arkansas. The report of the staff of the Federal Power Commission which has not been passed upon by that Commission indicates that the staff is of the opinion that there are additional write-ups in the accounts of Arkansas of approximately $2,468,000.

[12] Exclusive of profits on fees in the amount of $195,779 paid to affiliates.

[13] Exclusive of profits on fees in the amount of $185,425 paid to affiliates.

[14] Represents charges to earned surplus and property retirement reserve during 1942 and 1943 pursuant to orders of the Public Utilities Commissioner of the city of New Orleans.

[15] Includes write-downs made by Utah's wholly owned subsidiaries. The amount is exclusive of capitalized profits on fees paid to affiliates in the amount of $1,032,327 and a claimed credit of $484,039.

* Since Arkansas, Louisiana, and Mississippi were acquired by Electric in a basket transaction, the determination of the amount of write-ups included in the plant accounts of the individual companies involved a problem of allocating the purchase price among the three companies. As will be noted, the total determinations of the Commission and the Federal Power Commission with respect to the three companies were in almost complete agreement, differing by only about $224,000, although by individual companies there were more substantial differences by reason of different bases of allocation.

Nebraska transaction referred to by American (Br. pp. 95–96), the Commission did not pass on the price paid.[42]

The slim investment of American and Electric in the operating companies and the much more attenuated investment of Bond and Share was not a matter of accident, it was a matter of design. It was due in part to the very scheme of setting up the sub-holding companies in order to provide a vehicle for recouping Bond and Share's investment through the sale of bonds and preferred stocks after writing up the value of the assets of the operating companies. It is due further to the fact that when additional financing for expansion or improvements occurred it was effected through the sale of senior securities of the operating companies and the subholding companies in order not to impair Bond and Share's voting control and to retain and increase its leverage position. And when voting control became lessened through increases in outstanding preferred stock Bond and Share, through petitioners, engineered split-ups in the common stock so as to increase its percentage of voting power without the contribution of additional capital."[43]

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[42] That transaction is currently the subject of inquiry by a subcommittee of the House Committee on Interstate and Foreign Commerce.

[43] The record discloses that, in numerous instances when Bond and Share or the petitioners were dissatisfied with the adequacy of the voting power vested in the common stock of

The proffered valuation evidence

American complains that in making its determination the Commission refused to consider certain "valuation evidence" offered by it (Amer. Br. 97–101), but as we have shown above the undisputed evidence of violation of the statutory standards in terms of the company's own representations to the public and to the Commission was so overwhelming that no conceivable valuation testimony could affect the Commission's conclusions that the subholding companies are extreme leverage and pyramiding devices and must be eliminated to insure a fair and equitable distribution of voting power as well as to remedy undue complexity.[45] The Commission had before it a full record of earnings of petitioners and their subsidiaries, including dividend arrears, which showed that book investment was certainly not low in relation to proven earning power. More-

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a controlled company, they effected a split-up in such a manner as to multiply the voting strength of the common while decreasing the voting power of the publicly held preferred stock proportionately (R. 565, n. 62). The proposed split-up would be submitted for formal vote of the security holders, but no indication would be afforded to the security holders of the result of the action on relative voting power, although in some instances its immediate effect would be to strip voting control of a corporation from its preferred stockholders and vest it in the common stockholder, in each case the holding company. (R. 564–565.)

[45] For example, no amount of valuation testimony could explain away the vast accumulation of the arrearages on preferred stocks of both petitioners.

over, even if we accept the maximum value for American that Bond and Share offered to prove, the result would be that, instead of Bond and Share's control being exercised through ownership of 3.42% of the book value which formed the basis of the Commission's findings, such control would be exercised through ownership of 3.83% of the present value of the system.[46]

Valuation testimony would be relevant only in connection with Plans for compliance with the Commission's order, when the action to be taken has already been determined and the sole problem is the proper allocation of securities in a system simplified in accordance with the order. American's counsel recognized this fact and stated that the evidence was "directed to the Plan" (R. 256). Since the Plan was properly excluded from consideration in connection with the present issues, see pp. 136–140, *infra*, the valuation

[46] The offer of proof (R. 240–253) was to the effect that American's interest in its subsidiaries would be established at a value of $315,500,000 (R. 251). Substituting this amount in Appendix E–1 (R. 663) for the $303,837,930 shown therein as the underlying book value of American's investments in its subsidiaries as of December 31, 1941, Bond and Share's interest in the total capitalization of American would be $28,395,213. The result is that through an investment in the amount of $28,395,213 Bond and Share controls American's subsidiaries whose properties have a "value" of $741,854,644 (R. 248). Control would thus be exercised through 3.83%, as compared with the percentage of 3.42% upon which the Commission's findings are based. Cf. the percentages in Electric, *supra*, pp. 45–46.

testimony fell with it. The timing of the offer [47] and the nature of the testimony offered [48] clearly indicate the purpose of the offer was merely to delay the entry of an order.

The bases of the Commission's computations in determining inequitable distribution of voting power

Petitioners criticize the Commission's analysis of voting power. They argue that it involves the fallacy of assuming that debt securities and preferred stock should have a vote, and that it involves a comparison of Bond and Share's and petitioners' holdings in subsidiary capitalization "which consist primarily of voting securities * * * with total consolidated capitalization, including debt and non-voting preferred stocks, without any reference to position or function of the securities in the system." (Amer. Br. p. 89, and see Elec. Br. p. 39). It is then urged that this position is inconsistent with the Commission's disposition of financial applications in

[47] It was not until after two years of hearings and when steps were being taken to conclude the proceedings that American made a formal offer of its valuation evidence as part of the steps taken to conclude the hearings.

[48] The testimony offered consisted in part of "reproduction cost new" estimates by one of Bond and Share's managers (R. 241). For the relation of such testimony to present values, see *Federal Power Commission v. Natural Gas Pipeline Company*, 315 U. S. 575. Cf. *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U. S. 591.

which the Commission has permitted the issuance of bonds and preferred stock having no normal voting rights but merely contingent provision for controlling voting rights in the event of arrearages on preferred stocks. Petitioners neglect to point out that the Commission's approach to the problem of bringing about equitable distribution of voting power, whether in new financing or in reorganizations, has been primarily to insist that the control of the enterprise be exercised through the medium of common stocks which represent a genuine "cushion" of junior investment, rather than to endow with voting control bonds or preferred stocks in amounts disproportionate to assets and earning power.[49]

Of course, this does not mean, nor did the Com-

[49] See *Jacksonville Gas Company*, 11 S. E. C. 449, 457, wherein the Commission approved a plan providing for reduction of operating company debt and issuance of new common stock to creditors in order to correct inequitable distribution of voting power in an operating company. With respect to other possible methods of correcting inequitable distribution of voting power, the Commission said:

"For example, the suggested alternative of shifting voting control to the senior security holders, but leaving the existing capitalization unchanged, would leave outstanding a common stock with neither value nor voting power—a security which could serve no purpose other than to ensnare uninformed and unsuspecting investors. For another thing, such a capital structure would render almost impossible any sound financing by the company. It would do only part of a job that Section 11 is designed to do and would be inconsistent with the objectives of the Act."

The Commission also referred to the declared policy of

mission determine, that the percentage of voting power and the percentage of investment should be equal. As the Commission stated in its findings with respect to National Power and Light Company, *Electric Bond and Share Company, et al.*, 9 S. E. C. 978, 992:

> In making the above series of computations and comparisons, we are not unmindful of the fact that a comparison solely of the capital invested by each class of security holder is not conclusive on the issue of the fairness and equity of voting power distribution without possible weighting for differences in the risk position of the respective classes of security holders or other factors. However, there is no process of weighting that could render fair and equitable a distribution of voting power which vests complete control of the system in securities which represent at best 6.65 percent of the capitalization (without any adjustment for known write-ups or deficient retirement reserves) and in effect disfranchises those who contributed 93.35 percent

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the Act to eliminate evils which include "securities • • • issued upon the basis of fictitious or unsound asset values having no fair relation to the sums invested in or the earning capacity of the properties;" and added:

"A mere shift in voting power, leaving the corporate structure of the Jacksonville company unchanged, would be clearly repugnant to those policies.

"A mere transfer of voting power would also be unsatisfactory from other points of view. It would be unsound from the point of view of managerial policy to have voting control vested in securities having a limited return; in a

of the system's capital. Accordingly, we find that voting power is unfairly and inequitably distributed among the security holders of the National-Bond and Share System, within the meaning of Section 11 (b) (2) of the Act.

This is in no way inconsistent with the Commission's exclusion of Bond and Share's direct holdings of securities in certain of the operating companies in determining its investment in control. These securities are no part of the investment through which Bond and Share's control over the operating companies "is exerted" (see Section 1 (b) (3) of the Act), since, as we have seen, such control stems from its control over the petitioners. Whether or not Bond and Share owned these securities would not affect its con-

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case where the common stock had some small equity in the enterprise, the difficulty of protecting its interest under such circumstances would be obvious. Transferring to the bondholders the presently outstanding common stock carrying the voting power (even if it could be done under the statute) would not be a solution as there would be no assurance that the bondholders would retain the stock, and as soon as it was transferred, the problem would again be as it is found today."

See *In re Jacksonville Gas Company*, 46 F. Supp. 852, 857 (S. D. Fla), approving and enforcing the same plan. See also *Massachusetts Mutual Life Ins. Co.* v. *S. E. C. and Laclede Gas Light Co.* (C. C. A. 8), decided October 30, 1945, wherein the Court said: "The findings that the indebtedness of Laclede Gas is excessive, and that the distribution of voting power among its security holders is inequitable are not controverted. The first of these conditions is obviously the cause of the second."

trol over the system.[50] Nor do these holdings have any bearing on the extent of the unfairness of the voting power caused by the corporate structures and existence of petitioners.

B. *American and Electric Unnecessarily and Unduly Complicate the Structure of the Bond and Share System*

1. Petitioners cause major complexities in the Bond and Share system

Section 11 (b) (2) makes it the duty of the Commission to require the taking of such steps as it shall find necessary "to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly *or* unnecessarily complicate the structure, * * * of such holding-company system." [Italics supplied.] The Commission's

[50] Indeed, the Commission might well have excluded all system holdings of non-voting securities, which would have further reduced the percentages. These included 13,905 shares of Electric's non-voting second preferred stock owned by Bond and Share (R. 544), and substantial holdings of various debt securities of its subsidiaries by American, e. g. $22,000,000 of Florida Power & Light Company 6% gold debentures, and $10,589,000 of Montana Power Company's 5% debentures (R. 659).

With one exception, the operating company holdings in Bond and Share's portfolio consist only of debt securities. Bond and Share's holdings of United Gas Corporation, a subsidiary of Electric, alone include voting securities, but only in a relatively minor amount (R. 613). These non-voting securities are not the securities by which Bond and Share controls the system. Moreover, there is an inherent unfairness in the combination of control through a junior

finding rests severally on the facts that petitioners "unduly" as well as "unnecessarily" complicate the structure of the Bond and Share system (R. 634). We show below (pp. 80–93) the basis for the Commission's finding that such complication as is caused by petitioners' existence is wholly unnecessary because they perform no useful function. Absent a useful economic function it is self evident that petitioners' continued existence is an unnecessary complication since even if they had the simplest capital structures and were not used as leverage devices in the Bond and Share system, the mere interposition of subholding companies incorporated in Maine between Bond and Share, a New York corporation, and the operating subsidiaries located in states other than New York and Maine is unquestionably a complication.

With respect to the undue character of this complication the Commission's finding rests upon the circumstance that the function of the petitioners in the Bond and Share system—that of leverage and pyramiding devices—typified the evils which Section 11 was intended to eliminate. As shown

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equity security with a debt claim ahead of public holdings in preferred stocks. One of the most unfortunate situations in which a public investor in senior securities of a subholding company may find himself is that which exists when the parent holding company which owns the control securities junior to his investment also has a prior ranking debt claim against the underlying subsidiary, thus threatening to grind the public investor as between the upper and nether millstone. See, for example, *In re Commonwealth Light and Power Company*, 141 F. 2d 734 (C. C. A. 7).

by Section 1 (b) (3), those evils included among other things, the control of operating companies "exerted through disproportionately small investment." [51] It was largely through the use of petitioners as leverage and pyramiding devices that Bond and Share was enabled to amass control over billions of dollars contributed by others and to realize for itself huge earnings and profits without

[51] Petitioners complain that Congress did not use the words "pyramiding" and "leverage" in the Act. These concepts were, however, unquestionably part of the legislative background and recognized as among the major evils against which the Act was directed. With respect to pyramiding and leverage, The Federal Trade Commission stated:

"A relatively small investment in common stock in the higher levels of a pyramided structure may represent absolute control of underlying operating companies with assets of hundreds of millions of dollars. The fact that public utilities are normally financed to a larger extent than industrials by the sale of bonds and preferred stock with comparatively low fixed returns and generally with no voice in the management, so long as interest is not in default nor preferred dividends in arrears, is the fundamental basis of the pyramid. It results in absolute operating control by a relatively small investment in common stocks and a very high rate of return on the common stock, provided the operating companies are prosperous, but a low, or no, return on such common stock when the business of the operating companies shrinks.

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"This form of structure has two startling results. The investment representing management control is reduced to a dangerous minimum, and this extremely thin equity becomes the recipient of any residual earnings over and above the fixed dividends and interest requirements of senior securities. * * * in the electric public-utility industry the tendency has been to regard about 7 or 8 percent as a reasonable rate

investment."[52] Congress, and all the responsible agencies whose findings Congress adopted, found that these functions are deleterious to the national

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of return for operating companies. If the rate base on which the return is computed is equal to the book investment of the operating company an 8 percent return is adequate to pay normal interest and preferred-dividend rates for the operating company (with 50 percent in bonds and 25 percent in preferred stock) and leave residual earnings for the common stock which, if passed up through a holding-company pyramid of only two holding companies, in which the common stock is in each case 50 percent of the total capitalization, represent an extraordinarily high rate of return on the common-stock equity representing ultimate control.

"Any reduction below 7 percent for the operating companies, however, encroaches rapidly on the common stock equity earnings; and a decrease, say, to 5 percent, would dry up all earnings for the higher layers of the pyramided structure, so far as those companies depended solely on operating company dividends for income. Whichever is the result, the consequences are unfavorable to investors, on the one hand stimulating a dangerous speculative interest and on the other hand bringing financial loss, and maybe ruin, to many shareholders who regarded the securities of the top holding company as a sound investment.

"None of the large holding-company groups appears to have had a suitable capital structure from an investor's standpoint." (*Utility Corporations*, S. Doc. No. 92, 70th Cong. 1st Sess. (1935), Part 72–A, pp. 858–859.) See also Committee on Interstate and Foreign Commerce, *Report on the Relation of Holding Companies in Power and Gas Affecting Control*, H. Rep. No. 827, 73d Cong., 2d Sess. (1933–1935) (Splawn Report), Part 2, page vi.

[52] From this point of view, Bond and Share was for a long time fantastically successful. The record establishes that at the beginning of 1928 Bond and Share controlled the subholding company systems of American, Electric and National with a combined net common stock investment of approximately *minus* $4,500,000 ($1,376,365 in American,

economy and must be curbed. (See Sections 1 (b) and (c) of the Act.) Thus, the Commission's findings that American and Electric were created and have always existed solely as instrumentalities for the perpetration of these condemned objectives (R. 534, 598–600, 634) establish that petitioners are the very complexities which it is the Act's purpose to eliminate.

With control of the entire enterprise in a top holding company common stock which represents a minimum of investment and a maximum of leverage, there is pressure to increase the leverage characteristics at each level in the holding company pyramid. *At the operating company level* this means, as the present record demonstrates, inflation of plant accounts and consequent obstruction to efforts of regulatory authorities to ascertain investment in aid of effective rate regulation.[53] Sale to the public of operating com-

$694,424 in National, and minus $6,500,000 in Electric). Those systems at that time had consolidated assets in excess of $1,000,000,000. At that time Bond and Share was receiving about $2,000,000 a year in dividend income from these three sub-holding companies and $6,000,000 in service fee income from their subsidiaries, of which the net profit represented probably two-thirds of that amount, or $4,000,000 (Commission Exhibit 68e, pp. 1810–15; R. 579). Thus, pyramiding, writeup and leverage produced a net annual income for Bond and Share of $6,000,000 on an investment of $1,500,000 less than nothing.

[53] For an example of a conscious attempt to confuse local regulatory officials, see the office memorandum from Samuel W. Murphy, then a member of Bond and Share's legal department and subsequently its president, to Frank A. Reid, its general attorney, wherein he emphasized the importance

pany debt securities and preferred stocks in amounts sufficient to recoup the entire cost to the holding company of acquiring control has been a deceptive practice, since the senior securities which investors bought did not have the cushion of junior investment they had reason to expect.[54] After an operating company becomes part of a leverage holding company system there is pressure to skimp depreciation in order to facilitate maximum dividend payments to the

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"of scrambling all these reorganizations together so that about the only thing the Pennsylvania Commission will be able to understand will be the result and not how the result was reached," and see the footnote comment thereon of A. D. Root, an employee of Bond and Share, as follows: "This plan at its present stage is for home consumption only, and I tried to make it simple for that reason. Is not scrambling just a matter of presentation?" Root also pointed out that the state Commission would be unlikely to see original costs "as they are all on Lehigh Books". (R. 823, n. 16, 17). The "Lehigh" referred to was Lehigh Power Securities Corporation, which was a Delaware incorporated subholding company in the Bond and Share system (Comm. Ex. 405A, 405B).

[54] Although the incomes of public-utility operating companies were, as is well known only moderately affected by the depression as compared with industry generally (see *The Electric Light and Power Industry in the United States*, Edison Electric Institute Statistical Bulletin No. 9 (1941), p. 39, Table 33), approximately one-half of the subsidiaries of American and Electric having preferred stock outstanding went into arrears of dividends on their preferred stocks because of their topheavy and inflated capitalizations, and in a number of cases maturing bond issues could not be met, with resulting Section 77B proceedings or bondholders' extension agreements. See e. g. New Orleans Public Service, Inc. (Comm. Ex. 821); Portland Gas & Coke Co., Tr. 9479. When the record herein was closed, a number of the operating companies still had substantial accumulated arrears on their

parent holding companies[55] and to finance plant additions exclusively by sale of new senior securities. Absent pressure from holding company parents, the operating subsidiaries of American and Electric companies would be free to sell common stock for new capital and thus avoid having their structures become progressively more ill-balanced and top-heavy as their outstanding senior securities increase through the years.[56] It has been the Commission's experience

preferred stocks which in some instances have since been eliminated pursuant to recapitalizations effected pursuant to the Act. See, e. g., *United Gas Corporation*, — S. E. C. — (1944), Holding Company Act Release No. 5271; *Mississippi Power & Light Co.*, — S. E. C. — (1944), Holding Company Act Release No. 4888.

[55] The record establishes that this was the general practice in the Bond and Share system. For example, in its findings (R. 603, n. 107) the Commission describes the case of Washington Water Power Company, which prior to the time that American acquired control had been consistently accruing for depreciation at a rate of approximately 3.37% of depreciable plant per annum, about the same amount as was claimed for income tax purposes. As soon as American obtained control, it reduced the book accrual for depreciation to 1.85% of plant, and *increased* the dividends paid on the common stock. In subsequent years depreciation accruals were further reduced.

[56] From date of acquisition by Electric to December 31, 1941, the combined debt of Electric's public utility subsidiaries increased approximately $106,000,000, preferred stocks increased $38,000,000, and common stocks less than $10,000,000. From date of acquisition by American to December 31, 1941, the combined debt of American's public utility subsidiaries increased $194,000,000, and preferred stocks increased $75,000,000 and as contrasted with an increased investment in common stocks of only $21,000,000.

that unsound holding company superstructures also served to embarrass regulatory agencies in their task of supervising new financing of the operating companies to the end that their financial structures be brought into balance.[37]

These unsatisfactory capitalizations of the operating companies are definitely among the evils which the Congress intended to correct through the Act (Section 1 (b) (1)). The concentration of voting control of the operating companies in the attenuated common stock equities owned by the holding companies also violates the expressed purposes of the Act against control with disproportionately small investment and against continuance of impediments to effective local regulation. Conversely, as we note below, the reversal of the process by which pyramided holding company systems were created, including the liquidation and dissolution of subholding companies, has eliminated water from operating company plant ac-

[37] In extreme instances where there has been urgent need of the operating companies to construct new facilities to serve the public and inability of parent holding companies to contribute equity capital, the Commission has found it impracticable, pending clean up of the holding company superstructure, to insist upon the new construction being financed otherwise than by adding new debt securities to an operating company already overbonded. See *In re Ohio Public Service Company*, 11 S. E. C. 104 (Cities Service Power and Light Company system), and *In re Virginia Public Service Company*, 11 S. E. C. 415 (Associated Gas and Electric system).

counts and provided them with more balanced capital structures.[58]

At the intermediate or subholding company level, the complications are at least equally serious. The petitioners have capital structures which are unsatisfactory from any point of view, and which are indisputably undue and unnecessary complications within the meaning of Section 11 (b) (2) of the Act. They are holding companies whose assets consist largely of *common stocks* of operating companies.[59] These common stocks of operating companies are preceded in asset and earnings claims by large amounts of

[58] As we show below, the opportunity to refinance at current lower rates high interest bearing bonds and high dividend preferred stocks which are presently outstanding, and to remove surplus impairments which would otherwise preclude declarations of dividends, may afford a financial incentive to reduce the leverage even where it means selling the holding company's interest in some operating companies to obtain cash for additional equity investment in other subsidiaries. Action of this kind has occurred in many of petitioners' operating subsidiaries since the Commission order under review, but has occurred as an incident to at least partial liquidation of petitioners rather than to their continued existence as pyramiding and leverage devices. See *infra*, pp. 107–114.

[59] Reference to the Analysis of Sources of Income chart which appears as Appendix B-2 to the Commission findings (R. 658) shows that the interest and preferred dividends which American received from its subsidiaries was approximately equal to its own interest charges. In the case of Electric, on the other hand, such interest income amounted to less than half of its own interest charges. Thus, so far as income is concerned, the preferred stocks of both petitioners rested exclusively upon the slender equities in the common stocks of the operating companies.

outstanding preferred stocks (sometimes as many as three different issues) and by mortgage bonds and sometimes debentures. Thus these common stocks are sometimes a fourth or fifth claim against the earnings of the operating companies. Upon these slender (and often nonexistent) junior equities, Bond and Share has reared the petitioners' structures consisting of bonds, two and three issues of preferred stocks, common stocks, and, in the case of Electric, option warrants.[60] Such holding company senior securities proved even more deceptive to investors than the inflated senior securities of operating companies.[61] In addition, the dangerous leverage factor, which is an inevitable concomitant of such pyramiding, affects the securities of the subholding companies as well as those of the top holding company.[62]

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[60] As noted above (p. 14, *supra*).

[61] See testimony of Commissioner Healy in Hearings Before House Committee on Interstate and Foreign Commerce on H. R. 5423, 74th Cong., 1st Sess. (1935), at p. 212.

"Commissioner HEALY. That is right. That is, you have the spectacle of people buying preferred stock in a holding company saying that they would not touch a common stock with a 10-foot pole, and when they look into the portfolio of the holding company and its assets, they see that they are common stocks, and they have bought common stocks without knowing it. And, the same thing is true of bonds. They rest upon those stocks."

[62] Appendix J to the Commission Findings shows the market range of American's stocks during 1925–1941, inclusive (R. 671). It will be noted, for example, that the market price of American's preferred stock has swung from a high of $107 per share in 1930 to a low of $11 per share in 1934 (all prior to the enactment of the Act), and that in

The problems of income and asset valuation resulting from the existence of these companies, to which the Commission referred in its findings (R. 626–627), are *not* confined to Bond and Share, as the petitioners urge in their briefs (Amer. Br. p. 84, cf. Elec. Br. p. 38). To be sure, they are especially severe in the case of Bond and Share, but they are very grave in the case of the petitioners themselves. It would be extremely difficult for most investors in American and Electric to appraise adequately their position in the system, a matter which is aggravated by dividend arrears.[63]

However, the complexities which the petitioners cause throughout the system are by no means merely those stemming from their capital structures. Even if their continued existence as pyramiding and leverage device structures were

a single year there has been as much as 400% change in such market prices. The common stock of American, having even more leverage, has swung about even more violently. The same table also shows how sharp and sudden gyrations have occurred in the earning power applicable to American's stocks.

Appendix K (R. 672) gives analogous figures for Electric. For applicable figures, equally significant, in the case of Bond and Share, see Appendix I (R. 670).

[63] American contends (Br. p. 68) that preferred arrearages are a "financial condition" and therefore cannot be deemed a "complication of structure." So is the capitalization of a company a "financial condition," yet we assume it will not be argued that it too does not go to "complication of structure." Aside from the obvious *non sequitur*, we submit that mountainous preferred arrearages, constantly increasing, are a complexity of the most serious kind whose effects extend throughout the system.

in themselves tolerable, petitioners would, as we have shown, continue to complicate unduly the Bond and Share system.[64]

2. American and Electric serve no useful purpose either functional or financial

The theoretical justification for utility holding

[64] The Commission also found that the continued existence of American and Electric would cause substantial unnecessary expense to their security holders. In the case of American these expenses (including taxes) exceeded $1,000,000 in 1941, and in the case of Electric they came to $490,000 (R. 634). These expenses more than offset the $300,000 increased dividend expense which American claimed would result from direct ownership of the operating subsidiaries by its investors plus an unstated amount of increased transfer costs which are the only specific disadvantages adduced to support petitioner's due process arguments (Amer. Br., pp. 24–25, 38). (American also complains of taking the corporate right to exist and hold its present properties and its security holders' right to continue their investments in present form, and refers to the alleged advantage of diversification through investments in holding companies.) Petitioners contended below that by filing consolidated tax returns they save their subsidiaries even larger sums. The short answer is that no such evidence was before the Commission, either by direct presentation or by filing of requested findings, exceptions to findings or otherwise. Moreover, even assuming such savings, there is no way of knowing whether consolidated returns, which became permissible under war time revenue laws that included the excess profits tax, will be permitted under future tax laws. If the privilege of consolidation should be removed, the partial tax on intercorporate dividends would accentuate the burden to security holders of continuing a useless holding company. Furthermore, the continued existence of otherwise useless and harmful corporations can hardly be justified on the ground that they serve as devices to reduce taxes.

companies is that they supervise and coordinate operating company subsidiaries both in their operations and in their financing. Whatever Bond and Share has accomplished in these directions (and we do not mean even by implication to concede that it has benefited either investors or consumers), American and Electric have not performed these functions and are not capable of performing them.

(a) *Lack of function as to operating matters*

Throughout their entire existence and until November, 1935 (the date when the registration provisions of the Act become effective), the petitioners were mere "paper" companies and did not have a single employee of their own. All officers of the petitioners were employees of Bond and Share paid exclusively by it, and all activities performed for or in the name of the petitioners were performed by employees of Bond and Share. More than a majority of the Boards of Directors and Executive Committee of the petitioners at all times consisted of employees and directors of Bond and Share or persons closely affiliated with it. All actions taken in the name of the companies were performed by employees of Bond and Share. Even when these companies were engaged in dealing with Bond and Share in the purchase of assets involving hundreds of millions of dollars (including enormous profits for Bond and Share),

they were represented solely by employees and counsel of Bond and Share. Their subsidiaries were managed in every detail by Bond and Share.[65] (R. 562–563, 592–594.)

In practical operation, no heed was paid to subholding company lines; the subsidiaries of American, Electric and National were managed on a *geographic*, not a sub-holding company, basis (R. 593–594, n. 102).[66] In short, corporate lines and identities were wholly disregarded. There was one large organization, and that organization was Bond and Share.[67] Functionally, the petitioners were, as the Commission found, mere sets of books in Bond and Share's office (R. 592).

The foregoing represented the situation until November, 1935. At that time, certain formal

[65] See, for example, the so-called "service contract" in force between American and Bond and Share from 1917 until 1929 (R. 825–835).

[66] It will be recalled that the subholding company systems (with the exception of American Gas & Electric) had been assembled as a matter of financial convenience and without regard to geographic relationship between the operating companies. The pattern of scatteration which resulted appears from the maps, Appendices B and C, *infra*.

[67] Cf. testimony of L. B. Wiegers, Secretary and Treasurer of Bond and Share (Tr. 450):

Q. (Mr. MacLane). "So is it fair to summarize the situation as it existed up to November 1935, by saying that from the standpoint of official and clerical personnel, Electric Bond & Share Company and these three holding companies, American, Electric and National, might be regarded as a single organization, save as strictly corporate action was taken separately by the boards of directors and stockholders of the different companies?"

A. "That is correct."

steps were taken on the advice of counsel [68] which, as the Commission found, effected no fundamental change. Thus, the names of American, Electric and National were lettered on the doors of a few offices in the Bond and Share office building at No. 2 Rector Street, and a handful of Bond and Share employees, together with the respective corporate books of accounts, was moved into each of these offices. The Bond and Share service section placed the name "Ebasco Services" on its office doors and was separately incorporated, with Bond and Share owning all its stock.[69] The "service contracts" which all the operating subsidiaries of American, Electric and National had always had with Bond and Share were assigned to Ebasco Services (Comm. Ex. 68a, p. 335). Directors were shifted about to avoid formal interlocking. This was all. (R. 592–598.)

The practical operation of the system continued as it had prior to 1935. The operations of the public utility companies of the system continued to be supervised and dominated by Bond and Share, in the same manner as when its service section was not called Ebasco Services Incor-

[68] Tr. 6859–60; Tr. 8613–14.

[69] Until 1940 the officers of Bond and Share were the officers of Ebasco Services. In 1940, when the Commission held that the arrangement was violative of Section 13 of the Act, S. R. Inch, President of Bond and Share, dropped his post in Bond and Share to remain as President of Ebasco Services. See *Ebasco Services Incorporated*, 7 S. E. C. 1056, 1075–1079 (1940).

porated. Subholding company lines continued to be disregarded (R. 593–594, n. 102). Budgetary and reporting controls continued to be exercised by Bond and Share (through Ebasco) (Comm. Ex. 1051 A and B). Even the New York bank accounts of the subsidiaries of American, Electric and National were still in the hands of Bond and Share (through Ebasco) (R. 604, n. 109). The personnel of the subholding companies, as the Commission found (R. 597–598), "have functioned since November 21, 1935 as subsidiary and complementary organizations of Bond and Share, possessed of substantially the same outlook, objectives, and loyalties as they had prior to November 1935."[79]

Each of the petitioners has a staff of from fifteen to twenty employees, consisting in the main of the corporate officers and a few clerical assistants (R. 593–595). This personnel, the Commission found, "is sufficient merely to perform necessary routine activities incident to the functioning of the subholding companies as corporate owners of securities" (R. 597).

As compared with the slender staffs of the petitioners, it is to be noted that each of the 16

[79] To such an extent is this true that the President of National indicated that he regarded the 1935 revision as something of a nuisance which had resulted in increased expense and decreased efficiency—a nuisance which counsel advised was made necessary by the Public Utility Holding Company Act if the existence of the subholding companies was to continue. He testified that he "would be delighted to go back to the old arrangement" (R. 598).

public utility subsidiaries of American has "a comprehensive complement of skilled personnel," the total for the group aggregating in excess of 12,000 officers and employees (R. 542). Similarly, each of Electric's 10 operating utility subsidiaries is fully staffed with expert personnel, the aggregate for the group being in excess of 14,000 officers and employees (R. 548–549).[71] In addition, each of the subsidiaries of American and Electric has contractual arrangements, for which it pays substantial fees, entitling it to receive continuous consultative assistance from Bond and Share's wholly-owned service subsidiary, Ebasco Services Incorporated. This organization has a staff of 630 employees in the United States Division and 156 additional employees in its Foreign Division, consisting mainly of professional personnel, such as accountants, analysts, and engineers. (R. 616, n. 128).

The technical needs of the petitioners' subsidiaries thus being fully cared for, as the Commission found, there remained no role in the operations of their subsidiaries for the petitioners to play, and even if there were, the petitioners were not equipped to perform it (R. 634, 645).

Further evidence that the subholding companies were not designed to coordinate or supervise

[71] The record contains an itemized payroll list for each subsidiary of American and Electric, and a functional chart showing how the personnel of each subsidiary is departmentalized and integrated to form a cohesive utility organization. For examples, see Commission Exhibits 279 and 478.

the activities of their operating company subsidiaries is found in their geographic grouping. An examination of Appendices B and C attached to this brief shows that American's subsidiaries are scattered from Florida to Washington and from Minnesota to Texas. Those of Electric are similarly dispersed from Mississippi to Oregon. From an operational point of view no conceivable plan for coordination can be found in the grouping of these companies under their subholding companies, and, as we have seen, their actual management ignores these lines.

(b) *Lack of function as to financial matters*

Before the Commission and the court below, petitioners argued (See, e. g., R. 600) that they serve as useful financing media for assembling scattered properties into compact and integrated companies and for furnishing equity capital and cash advances to their operating subsidiaries. Examination of this claim shows that it is baseless.

The argument made by petitioners relates primarily to past situations. It is clear that the companies presently and in the future can serve no function in assembling properties or in furnishing capital or cash to these subsidiaries.[72] Both

[72] We note below that incident to the partial liquidation of petitioners substantial cash has been generated, some of which has been utilized to strengthen the financial structure of the operating subsidiaries. This does not indicate that their continued existence would serve as a medium of raising new funds.

petitioners have at the present time vast accumulations of unpaid preferred dividends in arrears; neither was able to meet its dividend requirements throughout the ten years ending in 1941. In the light of their financial records (R. 540, 547, 632) and the standards of the Act (see Section 7 (d)), petitioners are in no position to raise capital through the sale of new securities. Such capital would be necessary in furnishing financial benefits to existing operating companies or in assembling properties into compact and integrated companies. And, under the Act, it is clear that under no circumstances could petitioners acquire additional scattered properties for any purpose. Indeed, even were petitioners permitted to continue to exist, they admit they would be required to dispose of their presently scattered properties and limit their systems to single integrated systems.

Petitioners, however, insisted that they be permitted to show their past activities to establish their valuable past functions as bearing on their present and future usefulness (R. 534), but examination of their past performance failed to reveal any past function other than the harmful functions of pyramiding and leverage referred to above. Thus the acquisition and combination of properties was not accomplished by petitioners in a manner designed to advance the interests of the investing or consuming public. The properties acquired were most frequently unrelated and not

subject to integration through common holding company control.[73] In certain instances the properties were already largely under the control of a single holding company, and the sums expended were merely to gain control of investments from other financial interests.[74] In view of the general competitive scramble for control of properties which was conducted with mounting fervor by rival holding company systems throughout the twenties, properties were obtained at prices bear-

[73] For example, at organization, Electric acquired control from Bond and Share and from another of Bond and Share's subsidiaries of four developed public utilities located in the states of Utah, Idaho, Texas, and Louisiana, respectively (R. 571, n. 70 and R. 573–575). This was precisely the type of control of unrelated properties which Congress found to be completely inimical to the public interest and which it condemned in the Act. See Section 1 (b) (4). Moreover, in the process Electric entered in its investment accounts at $69,900,000, securities which had cost Bond and Share and associated companies not more than $23,245,000 (R. 582).

[74] For example, see the acquisition by Electric of securities in the so-called Arkansas, Louisiana, and Mississippi group. The greater part of these securities had been assembled in a holding company called Southern Power & Light Company, which was controlled by other utilities and banking interests (R. 583–584). In order to give apparent asset support for the securities issued by these operating companies under Electric control, the plant accounts "were stated at a sum equal to approximately 144% of the combined plant accounts on the books of predecessor companies and 175% of predecessor plant accounts after adjustments for removal of identifiable inflationary items on predecessors' books" (R. 585).

ing no reasonable relation to their original cost."[76]

[75] For example, in 1925 American purchased the common stock of Northwestern Electric Company from the Fleishacker banking interests of California, which had organized the company in 1911 and operated it since. American paid the Fleishackers $5,000,000 for this stock, which the Federal Power Commission has since held was all "water" and must be written off (Tr. 10154 and F. P. C. Opinion No. 56). The order of the Federal Power Commission was sustained in *Northwestern Electric Co.* v. *Federal Power Commission*, 321 U. S. 119. Similarly, in 1928 American issued $153,333,620 of its own preferred stock to purchase control of two large and prominent utilities, Washington Water Power Company and Montana Power Company. The book value of these securities was approximately half the amount paid by American, and in the case of Montana $49,000,000 of this book value, representing the entire common stock, was water. (R. 566–567.)

See also footnotes 73 and 74, *supra*.

Cf. Report of National Power Policy Committee, H. Doc. No. 137, 74th Cong., 1st Sess., transmitted by the President to Congress on March 12, 1935 (this report was printed in full as an appendix to the Government's brief in *Otis & Company* v. *S. E. C.*, 323 U. S. 624):

"The growth of the holding-company systems has frequently been primarily dictated by promoters' dreams of far-flung power and bankers' schemes for security profits, and has often been attained with the great waste and disregard of public benefit which might be expected from such motives. Whole strings of companies with no particular relation to, and often essentially unconnected with, units in an existing system have been absorbed from time to time. The prices paid for additional units not only have been based upon inflated values but frequently have been run up out of reason by the rivalry of contending systems. * * * they have too frequently given us massive, over-capitalized organizations of ever increasing complexity and steadily diminishing coordination and efficiency.

"For all this concentration so dangerous to his democracy, the American consumer pays the bill. With a large and often

In many cases [76] the acquisition and combination of the properties were made by Bond and Share before ownership was placed in petitioners.[77] Petitioners, as mere tools of Bond and Share, exercised no initiative or judgment of their own.

As the Commission found, outlays made by petitioners in the combining of operating companies "were purely transitional and not at all in the nature of equity capital". (R. 603). Indeed, in some cases petitioners did not even provide funds for these transitional outlays; they were loaned by Bond and Share or by their subsidiaries (R. 604).

Nor were petitioners of substantial aid to their subsidiaries subsequent to their organization. The Commission found that "in the entire thirty-

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unsound capitalization to support, many holding companies have not been able to be satisfied with reasonable dividends on the securities of their operating companies * * *."

[76] Testifying before a Congressional Committee, S. R. Inch, then President of Bond and Share and now President of Ebasco Services Incorporated, stated:

"Mr. MAPES: Why could not that all be done by the Electric Bond and Share Co.?"

Mr. INCH: "It could, except that it was not at that time. I do not know whether it was wise or not; but it has worked, and that is really the test of usefulness as to these things. It was thought desirable when that group was done to close it and go on and do another job and *then to get the new investors that might come into that, you see.*" [Italics supplied.]

Hearings on H. R. 5423, 74th Cong., 1st Sess. (1935), (R. 599).

[77] See e. g. R. 554–558, 568–576.

two-year history of American, the record indicates only four instances of purchases of common stock of subsidiaries subsequent to organization, none of which constitutes an impressive instance of the supply of 'risk capital'" (R. 604).[78] Electric made an additional investment in only four of its operating companies after obtaining control of them.[79] The record demonstrates that it has been the public investors in the subsidiaries of American and Electric who have supplied virtually all of the capital that has gone into the development of such subsidiaries.

The record demonstrates also the unsoundness of any claim that the petitioners conferred bene-

[78] The four instances are detailed in footnote 110 of the Commission's findings (R. 604–5). They amount to $6,700,000, which for purposes of comparison must be placed beside the figure $840,760,062 at which the total assets of the subsidiaries of American were carried on their books as of December 31, 1941 (R. 665).

[79] The four instances are discussed in the Commission's findings (R. 587–591, 605–606). Aside from the United Gas Corporation, all its investments amounted to $5,802,500. Electric paid $60,000,000 cash into the treasury of United Gas Corporation. But as quickly as it was paid into United's Treasury, United paid out $36,000,000 of this to Bond and Share in partial repayment of a loan which Bond and Share had previously made to the predecessor of United. $21,000,000 of the remainder was used by United in payment of a bank loan the proceeds of which it had paid to Bond and Share in further repayment of an indebtedness to Bond and Share on the same loan. United Gas Corp. Record, Tr. 723–7, 2202–21 and Comm. Exs. 214–A–B, incorporated in this record by reference. Thus, Electric's investment was used to bail out Bond and Share.

fits on their subsidiaries by making substantial short-term loans. Many of such loans were arranged to make possible the payment of dividends to the petitioners and thus represented no more than book entries designed to inflate the income accounts of the petitioners. (R. 607.) To a large extent the subsidiaries themselves through upstream loans to American and Electric furnished monies for short-term loans to other subsidiaries, at interest rates higher than those which banks would have charged the borrowing subsidiaries on the same loans (R. 607–608). The holding company policy of restricting the cash and working capital of the subsidiaries to a minimum furnished the excuse for loans from the subsidiaries, and since these were in the essence mere demand loans the subsidiaries "could be, and at times were, placed in difficult and costly situations by the untimely demands of hard-pressed subholding companies" (R. 608–609, and see note 118). The Commission found that: "Whatever may have been the situation in the past, we note that subsequent to November 1935, American and Electric have made loans to subsidiaries in perhaps a dozen instances, the amounts involved being relatively small and in most cases for very short periods. Since the subholding companies charged from 3 to 6% on loans which almost certainly could have been obtained by the subsidiaries from banks for less, it is clear that the transactions were designed to benefit the subholding companies rather than the subsidiaries

and were actually at the expense of the subsidiaries" (R. 609–610).[80]

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The Commission's recital of the development of the Bond and Share system shows irrefutably that petitioners are paper companies, super-

[80] The United Gas Corporation situation illustrates the manner in which Bond and Share and petitioners have failed to help the operating companies financially. Since 1936 Bond and Share collected 6% interest on debt claims against United Gas totalling $53,000,000. There is little doubt that this debt could have been refinanced at the banks for not more than 3% (Tr. 4458–59). However, when the president of United Gas asked Bond and Share to reduce the interest, it was explained to him that Bond and Share needed to continue to receive 6% interest to service its own securities. (See testimony of J. H. Gill in *United Gas Corporation* (Tr. 4475, 4522–24), incorporated into the record of this proceeding by reference). Electric, which held large amounts of United Gas second preferred stock on which arrearages were accumulating, did nothing to protect the interests of its security holders. The public security holders of United Gas and of Electric continued to watch the arrearages pile up, while Bond and Share continued to collect its 6% interest. If United Gas had been free of the "financial assistance" of its parents, it could have cut the cost of carrying the "debt" by at least $1,500,000 a year.

Actually, after the close of this record, the Commission approved a reorganization program of United pursuant to Section 11 (e) whereby all Bond and Share's direct interest in United was eliminated so that United no longer pays interest or dividends to Bond and Share. The proceeding involved a compromise of Bond and Share's claims at $44,000,000, the difference being a settlement of contention that Bond & Share's claim should be subordinated. Refinancing was achieved primarily through the sale of a 3% bond issue. *United Gas Corporation, et al.* — S. E. C. — (1944), Holding Company Act Release No. 5271. See pp. 112–113, *infra*.

fluous from any functional point of view, conceived and utilized by Bond and Share solely to serve functions which Congress had determined to be opposed to the public interest. We submit that the record not only supported, but made inevitable, the Commission's findings that the existence and capital structures of American and Electric unduly and unnecessarily complicate the structures of the holding company systems of which they are a part.

II

IN THE LIGHT OF THE COMMISSION'S FINDINGS THE REMEDY OF DISSOLUTION IS PROPER

Having found that the corporate structure and continued existence of the petitioners unduly and unnecessarily complicated the structure of the Bond and Share system and inequitably distributed voting power among security holders of the Bond and Share system, and also that the petitioners' own structures were unduly complicated and involved inequitable distribution of voting power among the security holders of their own holding company systems, the Commission concluded that dissolution of petitioners was "necessary to ensure" correction of this situation and compliance with the standards of Section 11 (b) (2) of the Act.

Petitioners' challenge to the Commission's choice of this remedy is, as we have noted, the

focal point of their present arguments.[81] As the court below observed (R. 889), the question thus raised is whether there was any rational basis for ordering dissolution of petitioners in order to achieve compliance with the statute, and as this Court has stated, "the relation of remedy to policy is peculiarly a matter for administrative competence." See *Phelps Dodge Corporation* v. *N. L. R. B.*, 313 U. S. 177, 194; also *International Association of Machinists* v. *N. L. R. B.*, 311 U. S. 72, 82; *N. L. R. B.* v. *Falk Corporation*, 308 U. S. 453, 458; *Federal Security Adm'r* v. *Quaker Oats Co.*, 318 U. S. 218, 233.[82]

In determining that dissolution of petitioners was the appropriate remedy the Commission stated that "the action we must order to be taken is such as seems to us calculated to" correct the situation "most effectively and quickly, ever bearing in mind the stated policy of the Act to provide *as soon as practicable* for the elimination of all holding companies except as expressly provided in the Act." (R. 635.) The Commission stated that "while

[81] We discuss below (pp. 156–165): the contention, not made before the Commission, that the remedy of dissolution is not authorized by the statute.

[82] The obvious reason for entrusting the present task to an administrative agency was to accord with the recommendation of the National Power Policy Committee that this was necessary "to attain the flexibility desirable for the handling of this complicated problem in a realistic and prudent way." See appendix to Senate Report, 621, 74th Cong., 1st Sess., p. 58.

some measure of amelioration in their [petitioners'] statutory offensiveness might be afforded by other approaches, in our opinion no approach presently available holds out the promise of effectuating the statute's requirements fully or promptly" (R. 636). This conclusion accords with the recommendation of Dr. Walter Splawn, one of the experts upon whom Congress relied in enacting the Act, who specifically pointed out that:

> The most effective means of preventing pyramiding is to eliminate the so-called intermediary company interposed between the operating company and the company at the top.[83]

The Commission rejected "as wholly untenable respondent's [petitioners'] contention that in carrying out our duties under Section 11 we cannot find 'necessary' a course of action for which some alternative may be present, since such a construction would lead to the result that we should be rendered impotent to require *any* action where several courses of action appeared available to achieve the statutory objectives" (R. 639). As we have seen, however, the Commission stated that there were no alternatives to dissolution which offered comparable promise of ensuring compliance with the statute. For that reason, the Commission rejected such alternatives as appeared to it implicit in petitioners' so-

[83] Splawn Report, Pt. 2, p. VII, made pursuant to H. J. Res. 572 (72d Cong., 2d Sess.), referred to in Section 1 (b) of the Act.

called Section 11 (e) "plans." To show that the Commission's choice not only had a rational basis but involved an eminently fair and practical solution to a complex administrative problem, we state below the nature of that problem with particular reference to the following questions: (1) What is the function of a Section 11 (b) order in relation to the administration and enforcement of Section 11? (2) What are the practical consequences of the instant dissolution orders? and (3) What, if any, alternatives were open to the Commission?

1. *The enforcement function of a Section 11 (b) order.*—The requirements of Section 11 are not self-operative but require implementation by the Commission and the federal courts before any sanctions attach. The enactment of the statute gave notice to the industry that major changes would be required in the organization and structure of the typical holding company system. Thus, in the case of petitioners it was recognized from the outset that unless their constitutional objections should prevail, dissolution would be required.[84] From the effective date of the statute the holding companies were free to seek

[84] As we noted, *supra*, p. 37, in their answer in the registration suit which was before this Court (*Electric Bond and Share Company* v. *Securities and Exchange Commission*, *supra*) these petitioners stated that the threatened enforcement of the Act would "leave them with no alternative but to dissolve". Comm. Ex. 69 (Vol. 1, p. 177).

Commission authorization of transactions which would be accomplished under their existing corporate powers and which might, as partial steps toward compliance with Section 11 (b), reduce to more manageable compass such further action as might be required. In addition, at any time after January 1, 1936, the holding companies were also authorized to invoke the reorganization powers of the Commission and of the federal courts in accordance with the provisions of Section 11 (e). It was not, however, until after January 1, 1938 that the Commission could require by order, after notice and opportunity for hearing, the action or steps which the Commission should find necessary for simplification.[85] Hearings under Section 11 (b) can be and were in this case prolonged. Even the entry of an order under Section 11 (b) carries no immediate compulsion, for the penalties prescribed by Section 29 for violation of Commission orders are expressly made inapplicable to orders under 11 (b). Section 11 (c) provides that such an order under Section 11 (b) is to be

[85] As the Commission stated in its Seventh Annual Report to the Congress (p. 73), it did not begin the institution of Section 11 proceedings against the major utility holding company systems until the spring of 1940, approximately two years after the termination of the original litigation over the constitutionality of the registration provisions of the Act, the additional two years' opportunity given the holding companies to submit voluntary plans having resulted in the submission of plans which "amounted to little more than arguments attempting to justify the retention of the existing scattered holdings."

complied with within a year, subject to the possibility of an extension of time of an additional year. If, nevertheless, compliance does not occur the Commission cannot enforce its order without applying to a federal district court, pursuant to Section 11 (d). In such an enforcement proceeding the court may appoint a trustee who, with court approval, is authorized to dispose of the respondent company's assets, including disposition in accordance with a fair and equitable reorganization plan theretofore approved by the Commission.

Thus, the function of a Section 11 (b) order is to implement the original statutory mandate for simplification by a more specific prescription of what is to be done, and to do so in an order which in default of voluntary compliance must be susceptible of court enforcement. Because of the complexity of holding company organizations, as exemplified in the present record as well as in the studies referred to in Section 1 (b) of the Act, and because of the time lag between entry of the order and court enforcement, such an order must allow substantial latitude as to detail and yet be sufficiently specific to afford the respondent company in the first instance, and ultimately a court-appointed trustee, a definite goal to be achieved.

Such an order is a step in an over-all process by which it was intended to make the compulsions of the Act "sufficiently clear to convince the interlocking lawyers of the holding-company bankers

that it can't be evaded or compromised," whereupon it was hoped that "the legal and economic imagination which put these holding-company combinations together will devise many means of taking them apart."[88] While it was to be expected, in view of the opposition of the holding company industry to Section 11, that many ingenious legal arguments would be interposed against the entry of any order compelling any action, once it is established that the existing status contravenes the standards of Section 11 (b), the problem of determining the appropriate order is not one of legal dialectic but of practical administration.

Electric complains (Br. p. 22) of the "sporadic and halting manner in which the Commission has

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[88] Additional views of Congressman Eicher appended to House Report No. 1318, 74th Cong., 1st Sess., p. 50. Congressman Eicher added:

"But pending the certainty of such compulsions the legal and financial advisors of the holding companies have not been concerned to discover how the proposed legislation will work; they have only been concerned to discover reasons why it won't work."

In the course of administration also, the Commission has been confronted with great legal ingenuity on the part of counsel in suggesting reasons why particular orders will not work, but these have been accompanied by practical demonstrations on the part of other holding company managements and other counsel as to how compliance can be effected to the advantage of their security holders. Not infrequently the legal battle to protect the holding companies against being compelled to do anything has been almost contemporaneous with, if it did not overlap, substantial compliance by the same holding company management.

proceeded with respect to the system of Bond and Share and the system of Electric and the other sub-holding company systems, culminating in the dissolution of Electric and other sub-holding companies." Perhaps it is only modesty which prevents Bond and Share from claiming some credit for such halting administration.[87]

It is interesting to note that while petitioners now criticize the orders under review as unduly circumscribing their freedom of action because, as they contend, some remedy less than dissolution might have served to correct the statutory evils, petitioners argued in the court below that the orders do not meet the requirements of the intro-

[87] Despite the fact that Bond and Share and petitioners recognized from the outset that Section 11 would require dissolution of petitioners, no action of substance was taken toward that end until after the entry of the orders in the instant case. Bond and Share's original proposals in response to the inquiries of the Commission referred to in the Electric brief (p. 20) involved nothing more than a proposed re-grouping of the Bond and Share subsidiaries on a geographical basis, without any suggestion of dissolution or severance from Bond and Share, or other fundamental change. These proposals, renewed with some revision in text as recently as September, 1940, assumed that Bond and Share's control rather than that of the sub-holding companies was the focal point for integration under Section 11 (b) (1). See respondents' Exhibits 4 and 4a. When proceedings were started under Section 11 (b) (1), petitioners urged that certain exemption matters had to be disposed of first. Their procedural contentions in these proceedings are detailed in the Commission's opinion. (R. 529.) See also the objections not raised before the Commission but urged before the court below. (R. 876.)

ductory clause of Section 11 (b)[88] in that they do not prescribe in sufficient detail the "steps" which petitioners must follow in the dissolution process.[88] In fact, the orders have left them great latitude as to the methods of compliance; and, as the Commission pointed out in its opinion (R. 647–648), the next to last sentence of Section 11 (b) would permit revocation or modification of the dissolution orders if in the course of their efforts toward compliance petitioners bring about a situation in which their dissolution is no longer necessary to achieve the statutory objectives.

2. *What dissolution of a holding company such as petitioners involves.*—In the legislative battle over the passage of the Holding Company Act the opponents of Section 11 coined the phrase "death sentence" to symbolize their claim that the dissolution and simplification of holding company systems would be destructive of economic values. The contrary view as expressed, for ex-

[88] That dissolution orders are in fact sufficiently definite to permit voluntary compliance by the companies is indicated not only by the anti-trust precedents relied on by Congress (see *Northern Securities Co.* v. *United States*, 193 U. S. 197, and *United States* v. *American Tobacco Company*, 221 U. S. 106), but by the fact that other holding company respondents, including petitioners' associate company, National Power and Light, have found no difficulty in understanding how to comply with such orders. The relevant considerations for not entering orders more specific as to detail are similar to those which moved the industry to urge that compliance with the integration and simplification standards of the Act should not be placed by Congress in a "straight-jacket" (p. 151, note 127, *infra*).

ample, in Senate Report No. 621, 74th Cong., 1st Sess. (1935) was that dissolution of useless holding companies would merely provide a sounder organization for the underlying utility business, and preserve all intrinsic values.

Thus the Senate Report states (pp. 16–17):

> An argument has been given wide-spread currency by the opponents of the title that the elimination of the giant holding companies will demoralize the market for all operating securities because many operating-company securities will be thrown upon the market by the giant holding companies in the course of their dissolution. The argument is premised on the false assumption that the proposed title will cause the dumping or forced liquidation of securities by the giant holding companies. As has been explained above, the title does not require the dumping or forced liquidation of securities. Such disposition as may be necessary can be accomplished by reorganization which will equitably redistribute securities among existing security holders. Insofar as there may be some redistribution of the securities of operating companies through investment banking channels, this will not result in a substantial net increase in the supply of utility securities on the market because for every block of operating securities distributed there will be a corresponding block of holding-company securities retired. The net effect of such changes will be to strengthen the

market for utility securities generally by replacing holding-company securities with sound operating-company securities. Such operations, primarily of a refunding nature, should strengthen rather than weaken the credit of operating companies.

The market for operating-company securities will be no longer adversely affected by the disrepute into which holding-company securities generally have fallen. The individual investor in present-day holding companies should come out of any reorganization process under the title with far better securities than those with which he went into it. He should get a security which represents an actual down-to-the-rails investment in a regulated local operating company, or, at most, a regulated regional holding company. He should get a security which will bring him, instead of paper stock dividends, all the legitimate cash dividends the operating company can pay—not what is left of them after high salaries, large fees, bonuses to holding-company officers and bankers, and the purchase of securities at exorbitant prices from corporate insiders. In short, the individual investor should receive the kind of a security he thought he was buying in the first place. The actual clearing up, through clean reorganizations, of the tangle in which holding-company finance has left the industry and those who have invested in it, can reestablish a confident, stable market for good utility securities. But a fright-

ened policy of refusing to take hold of the obvious political and financial difficulties of the industry will only generate even greater future difficulties.

Dissolution of a holding company, in its simplest terms, involves nothing more than peeling off a corporate shell between the revenue producing properties of the operating subsidiaries and the ultimate individual investors who are the owners, directly or indirectly, of securities in the holding company to be dissolved. If petitioners had simple capitalizations consisting of a single class of common stock, and if their operating subsidiaries were in such shape that distribution of petitioners' holdings of their common stock would be consistent with the public interest and the interest of investors, compliance with the dissolution orders would involve nothing more than paying a liquidating dividend in kind. As a result of such liquidation both Bond and Share and the public security holders of the subsidiary holding companies would acquire direct interests in the operating companies in lieu of their existing indirect interest through stock of petitioners. The immediate effect would be that the same persons would have virtually identical interests in the same underlying businesses, but interests represented henceforth by separate certificates for each company, in lieu of the present state where their indirect interests in the various operating companies are not severable by indi-

vidual action but are represented by a single certificate of stock in the subsidiary holding company.

Dissolution of petitioners even under such circumstances would correct undue complexity in the Bond and Share system. It would be advantageous, moreover, both to the public security holders of petitioners and to Bond and Share, which has its own problems of compliance with Section 11, to be able to make separate disposition of securities in individual companies rather than having to deal with the stock of petitioners, representing an interest in a number of operating companies.

If, therefore, petitioners and their subsidiaries had the healthy financial structures which we have assumed for purposes of illustration, it is doubtful whether they could have any motive, with the possible exception of ephemeral tax considerations,[89] for resisting a dissolution order, and certainly there would be no basis for characterizing the remedy as in any way drastic. The facts that petitioners have such complex security structures and that at the time of the orders, many of their subsidiaries needed a financial house cleaning before petitioners' stock interest in the subsidiaries could be put in condition suitable for disposition make the process of dissolution prescribed by the order under review more complex than in the over-simplified case we have supposed; but these circumstances

[89] See footnote 64, p. 80, *supra*.

only made dissolution the more imperative to ensure correction of the respects in which petitioners' existence and structures had been found to contravene the standards of Section 11, and in order also to increase the resulting benefits to the investors in the system.

The nature of the financial house cleaning required by petitioners' subsidiaries is apparent from the Commission's findings as to the enormous write-ups in their asset accounts and the deficiencies in depreciation reserves; from the slender common stock equities after allowance for inflation in their accounts; from the fact that the interest and dividend rates on their publicly held bonds and preferred stocks were relatively high under the then "cheap money" conditions (see Appendix B–2 and B–3 of the Commission's Findings and Opinion, R. 659–660); from the complications caused by the existence of holding company debt claims and controversies as to the possible necessity for their subordination to publicly held preferred stocks; and from the fact that such elimination of inflationary items as might be required by the Commission or by other authorities having accounting jurisdiction might leave impaired surplus accounts and thus prevent payment of dividends out of current earnings unless the companies should undergo accounting reorganizations and recapitalizations. The requirement that petitioners liquidate and dissolve has both facilitated and furnished additional in-

centive to this process of financial house cleaning for the subsidiaries, a process which, in addition, might perhaps have been prompted by business considerations quite apart from the necessity of compliance with the Act.[90]

Dissolution also involves dealing with petitioners' own complex security structures, and satisfying the respective claims of the holders of their debentures and preferred and common stocks. Apart from the considerations that made necessary the further step of dissolution, substantial simplification of petitioners' own security structures was necessary in view of the Commission's finding that those structures cause undue complication and inequitable distribution of voting power in their own holding company systems. By reason of the fact that petitioners' own stratified security structures rest substantially upon common stock of operating companies, junior to large issues of publicly held debt securities and preferred stocks, it is essential that such simplification be carried to the point of substituting a single class of stock for petitioners' existing debt

[90] The dissolution order did not in terms require changes in the subsidiaries. The necessity for such changes as a preliminary to dissolution flows in part from the business considerations mentioned in the text and in part from the necessity that dispositions conform to the public interest standards of the Act. In addition, Section 11 (b) (2) would in many instances require recapitalization of the subsidiaries to correct inequitable distribution of voting power.

as well as their preferred and common stocks.[91] The necessity for such action was at least partially recognized by petitioners' own Section 11 (e) plans, since each of these plans proposed substitution of a single class of stock for various classes of stock presently outstanding, and indicated the need for retiring their debt, although somewhat vaguely in the case of Electric (R. 464, 467). The dissolution orders did not preclude such action. The dissolution orders left it open to petitioners, in the first instance, to propose methods of dealing with the successive claims of debenture holders and preferred stocks whether by way of preliminary partial plans of compliance or in a comprehensive plan of distribution in kind. In discussing American's plan, its President, H. L. Aller, testified that in this respect there would be no real difference between compliance with a dissolution order and the carrying out of any reorganization of American.[92]

The process of dissolution in such circumstances

[91] See *Commonwealth and Southern Corporation* v. *S. E. C.*, 134 Fed. 2d 747 (C. C. A. 3).

[92] R. 274. (Direct examination by Judge MacLane):

"Q. Do you regard this reclassification of stock as essential to any reorganization of American, or even to its dissolution? A. Yes, I regard it as highly essential. If American Power & Light Company is to be either reorganized or dissolved, the reclassification of stock will permit American to distribute values without wasting of those values, as would result if it were compelled to liquidate through a substantial sale of properties. It was felt that the sale of properties should be limited to as small an amount as necessary to facilitate the satisfaction of the debt of American."

can be a highly salutary process, as has been demonstrated in the steps taken by a number of holding companies to comply with dissolution orders. Indeed, it is demonstrated also by the action of petitioners' sister company, National Power and Light, which did not challenge the dissolution order, and has carried it out to the extent of filing a plan for its final liquidation, as well as by the partial action which petitioners themselves have taken despite the pending litigation.[93] In this process some operating companies have been sold for cash at prices deemed advantageous by the management. With their cash resources, augmented by such sales, and their holdings in the senior securities of operating companies, petitioners and Bond and Share have been able with Commission cooperation to bring about successive clean-up operations in the various operating companies.

For example, subsequent to the closing of the record in this case, Florida Power & Light Company consummated a conspicuous example of a successful operating company reorganization.[94]

[93] Such action has been taken in American's case with the express understanding that neither petitioners nor government counsel should regard the transactions as involving any waiver of objections to the orders under review, and we do not conceive that any waiver has occurred by either petitioner. In Appendix F to this brief we set forth the form of letter used to express this understanding with American.

[94] A phase of this reorganization was before this Court in *American Power & Light Co.* v. *Securities and Exchange Commission*, No. 470, 1944 Term, decided June 4, 1945.

Florida Power and Light Co., — S. E. C. — (1943), Holding Company Act Release No. 4791. American made a capital contribution to Florida consisting of $17,000,000 principal amount of debentures and preferred stock having approximately $4,400,000 of liquidating value, and permitted reduction of the stated value for the common stock by approximately $6,400,000. These steps by American made possible the elimination from Florida's plant account of approximately $30,000,000 of inflationary items and in turn enabled Florida to refinance its publicly held 5% bonds and 7% preferred stock with new 3½% bonds, 4⅛% debentures, and less-than-3% serial notes. Previously American's claims were at least in part subordinate to publicly held securities;[35] it emerged with sound securities in a company in which the annual interest and dividend claims on public holdings were reduced by over $1,400,000 per annum.[36] Furthermore, whereas prior to the transactions the possibility of sale or distribution of any part of American's holding in Florida would have been highly questionable, American emerged with a substantial

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[35] The Commission's findings indicate substantial basis for applying to American's debt claims the equitable principles applied by this court in *Taylor* v. *Standard Gas and Electric Company*, 306 U. S. 307.

[36] While larger income taxes permitted current realization of only $470,000, obviously this net savings does not represent the full benefit to American of the reduction in the claims of public bond and preferred stock holders.

common stock equity plus $5,000,000 of debenture, both readily susceptible of sale or distribution.

Another excellent example is the reorganization of United Gas Corporation, also consummated subsequent to the closing of the present record. *United Gas Corporation, et al.*, — S. E. C. — (1944), Holding Company Act Release No. 5271. Prior to the reorganization, United Gas had outstanding nearly $53,000,000 of 6% debt, $3,900,000 of 5% debt, and over $133,000,000 of 7% preferred stocks. There was a complicated problem as a result of the holding of the $53,000,000 debt claim by Bond and Share. Further there was a controversy as to the relative rank of public security holders and the system holdings as well as controversy between Bond and Share and Electric. In the reorganization the Bond and Share debt claim, plus $1,700,000 stated value of preferred stock, plus miscellaneous interests, held by Bond and Share were surrendered for a cash payment in the compromise amount of $44,000,000. Electric received common stock for its own holdings of preferred and common stock, and the public security holders of first preferred were paid their full redemption claim. A new 3% bond issue in the amount of $100,000,000 furnished cash to pay off the publicly held first preferred as well as the reduced Bond and Share debt claim.[97]

[97] As a matter of mechanics, cash passed from United Gas to Electric in return for preferred stocks and Electric effected the settlement of the Bond and Share claim.

In discussing the fairness of the plan to Electric, the Commission noted (assuming a 3¼% interest rate for the new bonds in lieu of the 3% rate obtained) that:

> * * * under United's present capital structure, the annual charges senior to the claims of Electric total $6,542,525 per year as compared with senior charges, under the proposed capital structure of United, of $3,250,000 per year. The resultant saving of $3,292,525 per year is a measure of the benefits accorded to United under the plan, which accrue principally to Electric's public security holders.[98]

The instances can be multiplied further, as in the case of the recapitalizations effected by American in three other subsidiaries, Texas Electric Service Company,[99] Texas Power & Light Company,[100] and Minnesota Power & Light Company.[101] In all of them, however, the pattern is substantially similar to the Florida transaction described

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[98] Holding Company Act Release No. 5271, at p. 31. This plan has been approved and enforced by a United States District Court. See *In re United Gas Corporation*, 58 F. Supp. 501 (D. Del.). Certain procedural problems with respect to review of this plan were recently before this Court in *Okin* v. *S. E. C.*, certiorari granted in part and denied in part, June 18, 1945, No. 1245, 1944 Term.

[99] — S. E. C. — (1945), Holding Company Act Release No. 5742.

[100] — S. E. C. — (1945), Holding Company Act Release No. 5797.

[101] — S. E. C. — (1945), Holding Company Act Release No. 5850.

above. Contributions of cash or securities by the holding company have permitted simplification of the corporate structures and substantial reduction of senior claims on income and have produced common stock equities of a character such as to be readily saleable to the public or distributable to holding company security holders.

Whatever course may be required to be pursued by a specific holding company, that course is measurably simplified by achievement of a portfolio of sound common stocks. Holding company senior securities may then be readily retired through distributions in kind, either voluntarily consummated or enforced by court order, or may be retired with cash obtained from public sale of such sound portfolio items. The process is, of course, no different whether pursued only to the extent necessary to simplify corporate structures in an integrated system where there is a genuine role for the holding company to play, or whether, as here, it is to be pursued to its logical conclusion of eliminating unnecessary, costly, and useless intermediary companies.

Following the clean-up of operating companies various alternatives are available to deal with the claims of the senior securities of the holding companies which are to be liquidated. Where cash is available from the proceeds of sales it may be applied in reduction of debt. Preferred stocks may also be retired in whole or in part by similar

cash payments. In some instances open market purchases have been used.[102] In other instances senior securities have been retired by voluntary exchange offers. Another possible method involves offering common stockholders the right to purchase common stock of a subsidiary which would otherwise be required to be disposed of, and using the proceeds of the offering to reduce or retire senior securities. Thus the current plan of Engineers Public Service Company to comply with the Commission's order requiring divestment of Gulf States Utilities Company, referred to at pp. 21–22 of our Engineers brief, involves permitting the common stockholders of Engineers to purchase from it the common stock of Gulf and using the proceeds to retire Engineers preferred.[103] A current plan to strengthen the structure of Pennsylvania Power and Light Company in the National Power and Light system, and thus facilitate the liquidation of National, involves offering National's common stockholders the right to subscribe to common stock of Pennsylvania in addition to that distributable to them in the liquidation of National. Bond and Share, as a stockholder of National, proposes to subscribe for its pro rata share. National proposes to subscribe for any of

[102] American has made open market purchases of its own bonds. See *infra*, pp. 120–121. A plan to retire the balance without a premium was disapproved as unfair under the circumstances. See *American Power & Light Company*, — S. E. C. — (Oct. 31, 1945).

[103] Holding Company Act Release No. 6131.

the offering not taken up by its common stockholders other than Bond and Share, and the Commission has approved the proposal.[104] Further possibilities include plans of exchange involving either individual securities or "packages" the acceptance of which becomes compulsory if approved by the Commission and enforced by a district court pursuant to Section 11 (e).[105]

Once the holding companies' capitalization is reduced to a single class of securities and the operating companies have been cleaned up, we have the relatively simple situation assumed above (p. 105) for illustrative purposes. Thereafter, as we pointed out, dissolution involves merely the removal of the unnecessary, costly, and useless intermediary company and the distribution of its assets to the persons entitled thereto. In some instances the process of reducing the successive claims of holding company security holders to the same rank and the distribution of the holding company's interest in subsidiaries can be telescoped into a single plan. An illustration is the plan of liquidation for United Light and Power Company which was before this Court in *Otis & Company* v. *Securities and Exchange Com-*

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[104] *National Power & Light Company*, — S. E. C. — (1945), Holding Company Act Release No. 6007.

[105] See the plan for Standard Gas and Electric Company, upheld by the Circuit Court of Appeals for the Third Circuit in *In re Standard Gas and Electric Company* (Sept. 14, 1945).

mission, 323 U. S. 624.[106] In view of the application of the "fair and equitable" standard as upheld by this Court in the United Light and Power case, security holders receive the same relative interests in the underlying assets, whether the Plan is one of direct liquidation or involves, first, simplification of the holding company structure to the point where its capitalization is represented by a single class of stock, and then distribution of the holding company's assets in liquidation.

Further illustration is afforded by the steps actually taken or contemplated by the three subholding companies of the Bond and Share system which have been ordered to be dissolved: National, American, and Electric.[107] Bond and Share's own description of the process is contained in a plan filed by it with the Commission on July 25, 1945. We quote its description of the steps taken under the Act by these three companies as of that date (pp. 7 and 8):

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[106] There had, however, been a number of preliminary steps in the course of which provision had been made for United Light & Power's first lien bonds and debentures. Thus the plan before this Court dealt only with the claims of preferred and common stocks.

[107] In explanation of National's not having appealed the dissolution order American suggests (Br. 21–22, n. **) that the problems confronting National were radically different from those confronting petitioners because of National's sale, prior to the dissolution order, of its properties in the T. V. A. area. However, the properties so sold comprised but 10% of the aggregate utility assets per books in the National system (using figures as of December 31, 1937, from Commission Exhibits 30a, 31a and 32a).

National Power & Light Company System

Following the entry of the order of the Commission dated August 23, 1941 * * * providing for the dissolution of National, the principles of a tentative plan to carry out the dissolution order were presented to the Commission on October 13, 1941.

In May 1942, a plan modifying and bringing down to date the tentative plan was filed with the Commission and subsequently has been further modified and amended. As a result of action taken under said plans and the prior retirement of the major portion of National's debt, the following principal steps have been accomplished by National and certain of its subsidiaries:

1. $24,500,000 of debt and $414,500 of assumed debt, and 279,716 shares of preferred stock of National have been retired. The preferred stock was retired in part through exchange for common stock of Houston Lighting & Power Company, a former subsidiary, and the balance through retirement at its liquidating value. Part of the funds for the retirement of the debt and preferred stock was obtained from the sale of National's investments in its Tennessee properties to the Tennessee Valley Authority and others, part from the sale of the portion of its holdings of common stock of Houston Lighting & Power Company not exchanged for preferred stock of National, and part from the sale of other investments.

2. A number of miscellaneous investments, including National's interests in West Tennessee Gas Company, have been disposed of.

3. Birmingham Electric Company has effected an adjustment of its accounts and capital structure, refunded its outstanding bonds after reducing the amount of its debt by $2,200,000, and has retired, or is in the process of retiring, an aggregate of 25,135 shares of its preferred stock.

4. Carolina Power & Light Company, having refunded its bonds in May 1940, effected an adjustment of its accounts and capital structure and subsequently exchanged its $7 and $6 preferred stocks for $5 preferred stock and reduced the amount outstanding by 10%.

5. Pennsylvania Power & Light Company, which refunded its debt in August 1939, is now engaged in effecting an adjustment of its accounts and capital structure.

As a result of these steps National now has only common stock outstanding and its major assets consist of the common stocks of Birmingham Electric Company, Carolina Power & Light Company and Pennsylvania Power & Light Company.

The Company is advised that plans for the completion of the dissolution of National and the settlement of certain claims * * * and a plan for the recapitalization and refinancing of Pennsylvania Power & Light Company are to be filed

with the Commission at the earliest practicable date.

[Since the date of this report, National has filed plans under Section 11 (e) providing for the settlement of intrasystem claims and for the final dissolution of National. Holding Company Act Release 6007. Also, Pennsylvania Power & Light Co., National, and Bond and Share have filed a joint plan for the reorganization of Pennsylvania, which plan has recently been approved by the Commission. *National Power & Light Co.*, — S. E. C. — (Oct. 26, 1945).

American Power & Light Company System

Operating companies of the American system have accomplished eleven refunding operations and fourteen reorganizations. Twenty properties have been sold to outside interests. Eight subsidiaries have been merged with other subsidiaries in American's system; six direct subsidiaries of American have been made subsidiaries of other subsidiaries of American; and five non-operating companies, subsidiaries of American's operating subsidiaries, have been disposed of to outside interests or the companies dissolved.

Of the twenty properties disposed of by American to outside interests, the largest were Nebraska Power Company, which was sold for approximately $14,421,000, and the oil properties of Glacier Production Company, which were sold for approximately $9,600,000.

American filed, in October 1942, an application for authority to purchase and retire $10,000,000 of its debt. Under the authorization thereupon granted, American purchased and retired $7,766,700 principal amount of Gold Debenture Bonds, 6% Series, and $776,700 of Gold Debenture Bonds, 6% Series, of Southwestern Power & Light Company assumed by American.

American also filed a plan with the Commission on July 13, 1944, pursuant to Section 11 (e) of the Act, under which it seeks approval to retire, at the principal amount plus interest to the date of retirement, $33,386,300 principal amount of its Gold Debenture Bonds, 6% Series, and $3,003,300 principal amount of Gold Debenture Bonds, 6% Series, of Southwestern Power & Light Company assumed by American, which together represent the entire outstanding long term debt of American. Hearings on the plan closed on November 9, 1944. No decision has yet been rendered by the Commission.[107a]

In addition to these steps, in November,

[107a] On October 31, 1945, the Commission issued its Findings and Opinion disapproving the plan, the Commission concluding that the fair and equitable standards of Section 11 (e) required that holders of American's debentures should receive 110% of principal amount plus accrued interest, and that holders of the Southwestern debentures (which are non-callable until 1947) should receive not less than 110% of principal amount plus accrued interest. American was given 30 days to file an amendment in accordance with the Commission's Findings and Opinion. An amendment designed to comply with this condition was filed on November 5, 1945.

1943, American filed a plan of recapitalization with the Commission which provides for a single class of capital stock. No disposition of this plan has been made, hearings having not yet been completed.[107b]

Electric Power & Light Corporation System

As a preliminary to the submission of a comprehensive plan for final compliance with the Act by Electric, five major operating subsidiaries have made accounting reorganizations and eight have successfully undertaken refunding operations. In further compliance with the Act, the common stock of Idaho Power Company was sold through public distribution, in 1943, for $10,361,250, and, in 1944, the transit portion of Utah Light and Traction Company was sold to outside interests for $675,000.

In addition, the reorganization under Section 11 (e) of the Act of United Gas Corporation (Electric's largest subsidiary) has been completed * * * On September 7, 1944, following hearings which were begun in 1941, United Gas Corporation's Plan of Reorganization was approved by the Commission. On November 21, 1944, it was approved by the United States District

[107b] American's application for recapitalization was consolidated for hearing with the proceedings under Sec. 11 (b) (2) for purposes of the determination of the appropriate allocation between preferred and common stock in any plan which might be proposed under Section 11 (d) to effectuate the dissolution order under review. Holding Company Act Release 4695.

Court for the District of Delaware. On November 28, 1944, the Plan was consummated. As a result of this Plan United Gas Corporation's capital structure was greatly simplified and now consists of $100,000,000 First Mortgage and Collateral Trust 3% Bonds, all publicly held, and 10,653,302.2 shares of common stock ($10 par value) of which 10,108,101 shares, or 94.9%, are owned by Electric.

On or about March 21, 1945 Utah Power & Light Company (Utah), a subsidiary of Electric, filed its application with the Commission for the approval of a Plan of Reorganization under Section 11 (e) of the Act, in which Electric joined. Such Plan provides, among other things, that Electric will surrender all of its holdings in Utah and will release Utah and its subsidiaries from all claims in favor of Electric against Utah and its subsidiaries, in consideration for which Utah will (a) pay Electric $650,000 in cash, (b) release Electric from all claims in favor of Utah or any of its subsidiaries against Electric and (c) assign to Electric all claims of Utah and its subsidiaries against the Company [Bond and Share] and its wholly owned subsidiaries. Hearings on this Plan have been completed, subject to call of the Trial Examiner, and a determination by the Commission is awaited.

As we have indicated in our North American brief (p. 88, 89, n. 45), disinterested financial commentators have agreed that (quite apart from any

considerations of public interest) the process of dissolution is one which adds value to the interests of holding company security holders.[108] In the instant case the Commission concluded, "it cannot be doubted that the dissolution of these companies which not only have never served any useful purpose but have been a medium of much harm, will effectuate the provisions and policies of the Act and will in all respects be beneficial to the public interest and the interest of investors and consumers; and we so find." (R. 636.)

3. *Suggested alternative types of orders.*—Two alternative substitute orders are suggested by, or implicit in, petitioners' criticism of the instant

[108] "The Outlook" for June 7, 1943 (publication of Standard and Poor's Corporation, vol. 15, No. 23, pp. 685–686), states:

"Holding company stocks have benefited from integration or liquidation plans filed with the S. E. C. in recent months. * * * Since utility holding company stocks normally sell at a discount from their liquidating value (just as do investment trust equities), the filing of liquidation plans has caused the prices of securities involved to advance sharply to approximately those values.

"This was the experience of the common stocks of Federal Water & Gas, National Power & Light, Niagara Hudson Power, and United Gas Improvement, all of which have lately filed integration plans, as well as the preferred stocks of Standard Gas & Electric and United Light & Power. Many of these issues more than doubled in price with the announcement that liquidation or integration of the holding company was planned. * * * additional utility holding companies will probably file integration of liquidation plans, which should prove beneficial generally to the market prices of their securities." For more recent comment, see note 124, page 146, *infra*.

orders. First, it is objected that the real offender against the statutory standards was Bond and Share—not petitioners[109]—and that therefore the Commission's order should be leveled at Bond and Share so as to require it to divest itself of its interest in petitioners. This argument of course proceeds from the false economic premise that dissolution of a useless holding company destroys something of value. Moreover, the alternative now put forward by petitioners would have given rise to at least some color of objection on the score of hardship. If the Commission had proposed to enter such an order, Bond and Share would doubtless have voiced objection to compliance on the ground that disposition of its interest in petitioners, as they and their subsidiaries were constituted at the time of the Commission's

[109] Petitioners' argument that they have been merely pawns of Bond and Share and should not be held responsible for its activities is not only based on the false premise that the remedy is punitive, but it is also pure ventriloquism in view of Bond and Share's complete domination of petitioners which enables it to speak through its own name or through petitioners in accordance with its ideas of litigation strategy. In this connection we note that these appeals were taken after both petitioners had advised their security holders they had no intention of appealing (see p. 22, *supra*); that Electric subsequently advised its security holders that the present appeal was being instituted at the request of Bond and Share; that American's petition for review was identical with Electric's and filed on the same day; that Bond and Share did not itself appeal; and that throughout this proceeding petitioners have been represented by counsel for Bond and Share and, indeed, were represented solely by such counsel until the closing days of the hearing before the Commission.

order, would necessarily have been at a sacrifice from the larger potential values realizable after clean up of the financial structures of petitioners and of the operating subsidiaries.

In any event, such an order would have been far more difficult than the instant orders to enforce in a manner consistent with the public interest and the interest of investors. One difficulty such enforcement would present would relate to appraising the value of Bond and Share's holdings of petitioners' common stock, either for purposes of a fair and equitable plan of distribution among its stockholders or for passing on a sale price. Thus in considering a program of Bond and Share to make market purchases of its preferred stock, the Commission pointed to the virtual impossibility of appraising the potential value of the preferred stockholders' claims. See *Electric Bond and Share Company*, 10 S. E. C. 1, 4–5.[110] While some of the complexities there involved related to other sub-holding companies, appraisal of Bond and Share's interests in the common stocks of petitioners would have been a substantial part of the

[110] It is noteworthy that the so-called plans filed by petitioners expressly disclaim any present attempt to suggest an allocation among existing stockholders of the new common stock which they propose to substitute for existing stocks. Electric's plan stated, "various factors make it impracticable at the present time to determine what would be a fair and equitable distribution" (R. 482). American's plan merely stated that the new common stock might be "allocated on an equitable basis to each class of stock" (R. 416). See also the explanation of its president (R. 273).

task which the Commission concluded to be so baffling. Persons acquiring Bond and Share's interest in petitioners would be acquiring an interest in companies which were themselves subject to the necessity for drastic reorganization, and with assets consisting of securities of subsidiaries also in need of reorganization. These complexities would have tended both to impair marketability and to impede fixing a fair basis for allocation.[111] Enforcement of the order would also have entailed the difficulty discussed below of providing a management for mere paper companies which had theretofore performed no genuine economic function. Moreover, such an order would have been wholly inadequate to cure the statutory evils found to exist in the American and Electric systems.

(b) Another alternative, which was considered and rejected by the Commission as implicit in the so-called Plans which petitioners filed at the close of the proceeding, involved the simplification of petitioners' capital structure to the point where they would not offend against the statutory standards, and limiting each of them to such integrated systems as might be retained consistently with the standards of Section 11 (b) (1). Petitioners made no suggestion, however, that any order re-

[111] In systems where complexities are of a different order, as where the operating subsidiaries were in a relatively sound financial condition, the Commission has found it feasible to deal with top holding company problems before touching the problems of the subsidiaries. *Cf. United Light & Power* case, *supra*, pp. 116–117.

quiring such action would be appropriate or permissible at the then state of the record.[112] Their plans moreover made no provision for the elimination of Bond and Share's control. The Commission concluded that, among other difficulties, this program was "too fraught with potentialities of delay to be acceptable as a substitute for a dissolution order to meet the problems existing under Section 11 (b) (2)" (R. 641). Here again the plans were incomplete for failure to provide for the elimination of petitioners as pyramiding instrumentalities and complexities within the Bond and Share system. Moreover, the Commission observed that American and Electric are undue and unnecessary complexities, "partly because they do not perform, nor have they ever performed, any useful function," and noted that nothing in petitioners' plans was calculated to impart a useful function to petitioners (R. 645).

[112] Indeed, the only respect in which this point may have been urged before the Commission is in connection with the respondent's suggestion that if a dissolution order should be entered it should contain a reservation to the effect that either of petitioners should have the right to apply for revocation or modification of the order on a showing of (a) removal from the Bond and Share system, (b) reduction of capital structure to a single class of stock, and (c) disposition of all properties and securities not retainable under Section 11 (b) (1) standards. The Commission rejected this suggestion as unnecessary and undesirable in view of the express provisions of the penultimate sentence of Section 11 (b) for revocation or modification in the event that "the conditions upon which the order was predicated do not exist" (R. 647–648). See also pp. 133–134, *infra*.

The Commission stated (R. 645):

> There is nothing about the subholding companies which makes them vehicles for holding together a single integrated system in any respect superior to any other corporate entity, and in fact it would seem that a company specially formed for this purpose, with appropriate domicile [113] and a charter and bylaws free from the complexities found in those of American and Electric, would be far preferable. More important it is not at all certain on the present record that either American or Electric possesses any "single integrated system" which requires a holding company to hold it together.[114]

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[113] Petitioners are both incorporated in Maine, a state in which neither has subsidiary operating companies. See p. 9, *supra*. One of the serious holding company abuses has been the difficulty confronting local regulatory authority in dealing with out-of-state holding companies. Report of National Power Policy Committee, House Doc. No. 137, 74th Cong., 1st Sess., pp. 7, 8. See also Sections 1 (a) (5) and 1 (b) (1). Thus, the exemption provided in Section 3 (a) (1) for predominantly intra-state systems is unavailable if the holding company is not incorporated in the state where the operating company conducts its utility business.

[114] Electric, in connection with its asserted "Southern System", states that it is "the only visible means of integrating" that system (Elec. Br., p. 23). However, visibility and an existing charter are not necessarily advantages for any purpose, as evidenced by the general practice of the Bond and Share system to create new corporate entities to meet particular situations as they arise. And as pointed out in the Commission's opinion (R. 645), Electric's visibility does not render it superior to an invisible corporation specifically incorporated to hold together a Southern system in con-

The reorganization of American and its limitation to a single integrated system raised such problems that American has admitted there is real possibility that it cannot continue to exist after such reorganization (R. 432).

While Electric claims to have a "Southern System", the Commission stated that there was a substantial question whether it could meet the standards of the Act. First, it was composed of gas properties and electric properties, which the Commission has held cannot be parts of a single integrated system, but are separate systems. The gas properties, largely those of United Gas Corporation, are located principally in Texas, while the electric properties are located principally in Louisiana, Mississippi and Arkansas (see the map in Electric's brief facing p. 62). A rough indication of the size of the properties involved may

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nection with the dissolution of Electric. Compare the creation of a Texas holding company to hold together the Texas properties of American, *infra*, n. 118. In any event, the Commission's choice as to the method by which progress is most likely to be made should not be defeated by an argument that in one possible eventuality it may be feasible to use an existing, rather than a new, corporation to carry out the desirable business functions permitted under the Act. Charters are cheap. Thus it was recognized by American's president in connection with the contention that American's controlled companies should be continued in a group that those companies might constitute four integrated systems, "irrespective of whether they are retained by American in any particular instance" (R. 276). American's plan contemplated organizing 3 new holding companies to maintain unified control of subsidiaries to be divested by it (R. 401).

be obtained from referring to gross book assets of the subsidiaries in question. See Appendix F-2 to the findings (R. 667). The assets of United Gas Corporation were over $309,000,000 (using the unadjusted figures in Column 1). The electric utilities subsidiaries were Arkansas Power & Light Co., with over $76,000,000 of book assets; Louisiana Power & Light Co., $42,000,000; Mississippi Power & Light Co., $38,000,000; New Orleans Public Service Co., $80,000,000.[115] It was also doubtful, in the light of the size of the electric and the gas systems, whether they might both be retained by the same holding company under the standards for retention of additional systems.[116] The electric properties of the so-called "Southern System" taken by themselves presented serious problems as to whether in fact they are not "so large as to impair * * * the advantages of localized management, efficient operation, and the effectiveness of regulation" and, therefore, are not a single integrated system within the definition of Section 2 (a) (29). Even

[115] Dallas Power & Light Co., with $38,000,000 of book assets, is included in the map, Appendix C to Electric's brief, as part of its "Southern System." However, Electric's plan recognized that divestment might be required (R. 502), and the Commission has since approved its sale to American for inclusion in the Texas system referred to in note 118, *infra*.

[116] Although Electric appears to argue now solely on the basis of its electric system (See Elec. Br., p. 24), careful reading of its brief indicates that it has not abandoned its contention that the United Gas properties may be retained with these electric properties.

if the southern properties could be held to meet the Section 11 (b) (1) standards, there was further substantial doubt that Electric had sufficient investment in them to be permitted to serve as an agency to keep them together (R. 646). Since the Commission did not pass upon these questions, it was not inconceivable, at least in the case of Electric, that petitioners might ultimately be transformed into appropriate corporate vehicles for holding under common control integrated public utility systems.

Whatever the possibility of this result being achieved through voluntary action by petitioners, it was hardly a program for the Commission to order pursuant to Section 11 (b). Such an order would have required a sweeping change in the facts confronting the Commission. Moreover, such a program would be fraught with difficulties of enforcement through a court-appointed trustee in the event of non-compliance by petitioners, since it would involve, among other things, endowing with actual function and management paper corporations which had never theretofore performed any useful function. In addition to changing the capitalization and assets of petitioners to the point where there would remain scarcely a semblance of the existing entities, carrying out such an order would have been an act of promotion of a new holding company enterprise rather than a mere reorganization. To have the Commission and the enforcement court undertake such a function is

scarcely consistent with the declared policy of the Act to "provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided in this title."[117]

Nevertheless, in discussing the form of its order the Commission made it clear that if, through changes brought about by petitioners, or the Bond and Share management, petitioners could be transformed into holding companies which served the

[117] American (Br. pp. 106–107) argues that the Commission has applied an inconsistent remedy in a substantially identical case, citing *The United Corporation*, — S. E. C. — (1943), Holding Company Act Release No. 4478. That case presented an entirely different situation, as appears from the discussion in the Commission's opinion of the reasons why it felt it proper not to issue a dissolution order. United was afforded an opportunity to become an investment company. It was clear there that, since United, unlike petitioners, was a top holding company with a management of its own, its disposal of the securities of its subsidiaries and its elimination from control over them would remove it from the scope of the Act. Unlike United neither of petitioners has indicated any desire to become an investment company; in this case, the suggestion of petitioners is to the effect that they should be permitted to remain holding companies, a course which the Commission properly regarded as not a desirable one. But the Commission has not insisted on dissolution to meet all the problems presented by the subholding companies in the Bond and Share system. Thus no suggestion has been made that petitioners' sister company, American Gas, be dissolved since it appears that unlike petitioners, that company has a management of its own and can serve as a means of tying together a single integrated system. See the Commission's tentative findings and conclusions in *American Gas and Electric Company*, — S. E. C. — (1945), Holding Company Act Release No. 5591.

function of tying together properties satisfying the standards of Section 11 (b) (1) and needing a parent holding company, and if it appeared that either of petitioners would be an appropriate corporate vehicle for such purpose, then there would be room for modification of its orders under the express provisions of Section 11 (b) applicable in the event of change of circumstance (R. 647–648). Even if modification of the dissolution orders is not taken into account, there was nothing to prevent carrying out the orders through transfer to newly organized holding companies of such operating company stocks owned by petitioners as may properly be controlled by holding companies—a possibility suggested in both petitioners' plans (R. 400–401, 432, par. 59; 503, fourth paragraph) and which the Commission has subsequently approved on application of American.[118] Thus apart from the fact that the Commission's orders required action while petitioners' proposals promised only delay for an indeterminable period, the difference between the end results could amount at most to the difference between using an existing corporate vehicle or creating a new one.

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[118] American is acquiring Dallas Power & Light from Electric and putting it in a new holding company incorporated in Texas together with two of its own Texas subsidiaries, Texas Electric Service Co. and Texas Power & Light Company. The new holding company is to be divested by American, — S. E. C. — (Oct. 26, 1945).

Electric argues that the statute gives every holding company a right to hold a single integrated system and that the Commission can enter no order which does not continue a holding company's existence for this purpose. This misconceives the statute. Section 11 (b) (1) and Section 11 (b) (2) though related contain independent directions from the Congress. No holding company can continue to exist unless it meets the standards of both clauses. Of course a holding company simple in structure, which has truly functioning officials and a substantial stake in an integrated utility system, may retain that system. This, as we have noted, is contemplated by the Commission's tentative conclusions applicable to petitioner's sister company, American Gas and Electric Company. But this assumes that the holding-company system in question does not violate Section 11 (b) (2). On the other hand a complex series of holding companies over a single system cannot continue to exist; it must be scaled down by the elimination of all unnecessary holding companies. Of course the Act is designed to promote the economies obtained from integration of utility properties, and any single integrated system will not be broken up under the Act. But the Act is not concerned with preserving holding companies which cause unnecessary complexity in the system. In that simplification process there is nothing which requires an endeavor to preserve particular corporate entities as possible vehicles for hold-

ing together such properties in the holding company system as may properly survive as parts of a single system. The process of simplification may well result in the elimination of all existing holding companies in a system because a new company is more suitable for the purpose of holding the system together than any of the existing holding companies.

Petitioner's contention that the Commission must try to find an integrated system or combination thereof for each existing holding company in a holding company system is only another way of arguing that dissolution of a useless holding company is never permissible. Assuming, what was not questioned before the Commission and what is demonstrated in point IV, that dissolution is a method of simplification of holding companies clearly contemplated by the Act, the question narrows to one of the appropriateness of the remedy in this particular case. We have shown that the Commission's choice of that remedy was a rational one, designed to ensure compliance and highly salutary in its effect on the investors in petitioners.

4. *Petitioners' Plans are no bar to dissolution.*—Petitioners contend that no order of dissolution should have been entered without disposing of their plans and seeing whether those plans afforded an opportunity of preserving petitioners as holding companies. The possibility that either of petitioners could eventually conform to the

statute in this manner was, as we have seen, no bar to the entry of an order of dissolution. The argument is no more effective as a bar to the entry of an order because presented in the form of a "plan," particularly a vague and general plan with no present possibility of bringing the petitioners into compliance with the Act.

As we have seen, the Congress has imposed upon the Commission the duty to declare, by order, as soon as practicable, what each holding company system requires by way of integration and simplification. Section 11 (e), to be sure, provides an opportunity to holding company managements to anticipate Commission action under 11 (b)—or to comply with Commission orders thereunder—but, if petitioners' argument is accepted, it would provide an opportunity also for such managements effectively to stay the Commission's hand indefinitely by the simple device of proposing "plans", however inadequate, which purported to meet the issues tendered by the Commission in a proceeding under Section 11 (b).

Petitioners' argument is that they have a right to a hearing on the plans before a dissolution order is entered.[119] Presumably this rests on the theory

[119] Electric complains that its motion for consolidation was not denied until eight and one-half months after it was made (Elec. Br. p. 21). The record shows, however, that any delay in consideration of the motion was "pursuant to a mutual understanding," confirmed in a letter from J. F. MacLane, one of petitioners' counsel, to Commission counsel. (R. 233, Resp. Ex. 328).

that not until a hearing has been held can the Commission decide whether the plans have some effect on the need for dissolution. But the Commission is not required to blind itself to the obvious. A mere reading of the plans showed they in no way gave promise of eliminating the need for dissolution. The Commission's opinion (R. 639–647) points out in detail the deficiencies on the face of the plans.

It was pointed out that the provisions for recapitalization were vague and ineffective because they gave no details of a proposed new capital structure and made no specific provision for retirement of debt. (R. 642–643.) Electric's plan stated that "various factors make it impracticable at the present time to determine what would be a fair and equitable distribution" (R. 482), and American's plan stated that new securities might be "allocated on an equitable basis" (R. 416). American's president testified that to propose an allocation might focus attention on that matter "and controversy would arise with respect to it and detract from the merits of the plan as a whole" (R. 273). With regard to limitation to a single system, American chose no system and neither petitioner gave any specific indication of how such limitation was to be effected (R. 642, 643). For American's reasons for not being specific see R. 272. It was further pointed out that the plans would be ineffective because they did nothing about eliminating Bond and Share's

control over petitioners and removing the pyramiding character of petitioners; because the plans contained no provision for imparting a useful function to petitioners; because the plans gave no assurance that petitioners would have sufficient interest in any integrated utility system to serve as a means of holding it together; and finally because even if approved the plans could become effective only on approval of stockholders.[120] It seems clear that the Commission properly determined that there was no basis for concluding that "by virtue of these documents the dissolution of American and Electric is not 'necessary' within the statutory meaning" (R. 647).

Petitioners do urge that the Commission could have approved the plans subject to amendment (Amer. Br. 105). But the Commission has no power to *compel* an amendment of a Section 11 (e) plan, and the Commission was not required to expect reasonable amendments from companies whose plans were so completely defective. Indeed in the light of the evidence that the plans had been prepared and put forward only for purposes of delay (R. 636–638, 640, 641), the Commission would have been little less than naive if it proceeded on the assumption that satisfactory voluntary amendments to the plans would be forthcoming either before or after hearings.

[120] In the case of American's plan, approval of 90% of each of the company's two series of preferred stock was required in addition to majority vote of the common stock (R. 465).

Of course petitioners are entitled to have their plans acted on at an appropriate time, but they have not pressed these plans except as a strategic argument against dissolution. If they were to be acted on, the Commission has indicated that the proper course would be dismissal (R. 643). Indeed these plans have never had real substance except for the purposes of this litigation. As we have noted, *supra,* pp. 110–114, 120–123, many plans filed subsequently by petitioners have been approved and carried out because, unlike the present plans, they were specific and contained promise of assisting achievement of the statutory objectives. No point would have been served by consolidating the plans with the present proceeding and thus devoting to these plans the time and energy of Commission staff and company management which were in fact profitably devoted to consideration of the many other more limited proposals which have been consummated and have carried petitioners far along the road to compliance. Cf. *F. C. C.* v. *Pottsville Broadcasting Co.,* 309 U. S. 134, 143; *Brendle* v. *Smith,* 46 F. Supp. 522 (S. D. N. Y.).

III

SECTION 11 (b) OF THE ACT IS CONSTITUTIONAL

(a) *Interstate Commerce*

In our *North American* and *Engineers* briefs, we have analyzed the structure of the Public Utility Holding Company Act and have shown

how the integration and simplification provisions contained in Section 11 are designed to apply only to the typical interstate holding company. That the Court need not concern itself in this case with the possibility that, as applied to some other company, the Act might be too broad, is apparent not only from the analysis of the statute contained in the other briefs but also from the showing which has been made above. The Bond and Share system, and those of the petitioners themselves, are typical interstate holding company systems.

Indeed, petitioners have no local functions. They are exclusively instrumentalities of interstate commerce and interstate control. Incorporated in Maine, they serve as formal conduits whereby Bond and Share, from its offices in New York City, is enabled to direct and control every aspect of its nation-wide system of utility operating companies. They were promoted by Bond and Share as vehicles for nation-wide distribution of securities. It is these petitioners of whom this Court stated, on the basis of facts incorporated in the present record,[121] that their "continuous and extensive operations in [interstate] commerce" brought them within the ambit of Congressional authority. *Electric Bond and Share Co.* v. *S. E. C.*, 303 U. S. 419, 431–33, 440. The Bond and Share system, as indicated above, is a giant pyra-

[121] Comm. Ex. 68a–f.

mid consisting of Bond and Share, five subholding companies including the petitioners, and approximately 237 direct and indirect subsidiaries with consolidated capitalization and book assets approximating $3,000,000,000 and supplying electricity or gas to more than 2,300 communities in the United States having a total population of some 12,000,000 and located in 32 States and to over 1,000 communities in foreign countries. The analysis which has been made in Points I and II indicates the vast interstate implications of the systems involved and the great complexities and inequities present in those systems.

The complexities and inequities in the Bond and Share system are typical of the practices with which Congress was concerned when it declared the purpose of the Act to deal with the "evils as enumerated in this section, connected with public-utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce * * *" (Section 1 (c)). Congress declared that those evils, as set forth in Section 1 (b), adversely affected "the national public interest, the interest of investors in the securities of holding companies and their subsidiary companies and affiliates, and the interest of consumers of electric energy and natural and manufactured gas * * *." In our *North American* brief we have shown in detail how complex and overcap-

italized structures marked by pyramiding and leverage presented great hazards to investors in the securities of holding companies and their subsidiaries and also to consumers of their product. See, e. g., our *North American* brief, pp. 37–44, 55, 56, 71–74. There we pointed out by reference to the report of the Federal Trade Commission and of the National Power Policy Committee the great dangers to investors resulting from leverage securities which might quickly rise in value and just as quickly fall; that holding companies by reason of the leverage of their securities make of a relatively stable public utility enterprise a means of stock speculation and gambling, and that they create unsound capital structures resulting in pressure on operating companies to sustain the excessive capitalization to the detriment of their service to consumers as well as consequent resistance to reduction of rates. These evils are promoted by, and directly affect, the interstate commerce in which the holding companies engage, and Congress was clearly justified in exercising its commerce power to eliminate those abuses and effects. Indeed, this Court has recognized that the correction of the financial structure of a public utility enterprise bears a vital relation to the interstate commerce in which the enterprise is engaged or which it affects, a fact as true in the case of a typical interstate public utility holding company as in the case of an interstate railroad. See *Ecker* v.

Western Pacific Railroad Corp., 318 U. S. 448, 474:

> The reasonable earning power of securities, the terms and conditions of the respective issues, and the soundness of the aggregate capitalization affect the public interest immediately and directly. Capitalization is an essential factor bearing on an efficient transportation system for shipper, investor and consumer.

No difference can be shown between the present case and the *North American* and *Engineers* cases. From a constitutional standpoint, with a view to both interstate commerce and due process, there is no distinction between the remedies provided by Section 11 (b) (1) and by 11 (b) (2). Both deal with complexity in holding company systems; both direct simplification. They approach the problem of simplification by somewhat different methods; Section 11 (b) (1) by outlawing geographical dispersion of properties and Section 11 (b) (2) by attacking financial complexities and inequitable distribution of voting power in the system. The choice of two separate means to a proper end when both are clearly appropriate to that end creates no constitutional problem.

(b) *Due Process*

Most of petitioners' arguments as to due process have been answered in our *North American* brief. Indeed, some of those arguments were advanced by petitioners then appearing as *amici*

curiae. The only point now made not previously adverted to is the argument that the due process clause prohibits subjecting petitioners to "compulsory involuntary reorganization," a process asserted to be possible only under the bankruptcy power. It is thus asserted that no power exists under the commerce clause to dissolve a state corporation, to reorganize it, or presumably to alter in any way the powers granted it by the state. To prove the fallacy of this argument it is necessary only to refer to the anti-trust cases requiring reorganization or liquidation of solvent companies. *United States* v. *Reading Co.*, 253 U. S. 26; *Northern Securities Co.* v. *United States*, 193 U. S. 197.[122]

[122] We quote from the opinion in *Northern Securities Co.* v. *United States*, 193 U. S. 197, 344-45 (1904), describing this argument:

"In other words, if the State of New Jersey gives a charter to a corporation, and even if the obtaining of such charter is in fact pursuant to a *combination* under which it becomes the holder of the stocks of shareholders in two competing, parallel railroad companies engaged in interstate commerce in other States, whereby competition between the respective roads of those companies is to be destroyed and the enormous commerce carried on over them restrained by suppressing competition, Congress must stay its hands and allow such restraint to continue to the detriment of the public because, forsooth, the corporations concerned or some of them are state corporations. We cannot conceive how it is possible for any one to seriously contend for such a proposition. It means nothing less than that Congress, in regulating interstate commerce, must act in subordination to the will of the States when exerting their power to create corporations. No such view can be entertained for a moment."

Since great emphasis is placed in American's brief (pp. 35–40, 85–88) on the contention that the statute is retroactive and *ex post facto,* we reiterate that Section 11 is remedial and imposes no penalty for past acts—it is merely a direction that a previously existing relationship be terminated for the future in order to protect the public interest. It is clear from the cases under the Antitrust and Hepburn Acts that such a regulation is not subject to constitutional attack as retroactive or *ex post facto.* See *United States* v. *Trans-Missouri Freight Assn.,* 166 U. S. 290, 342; *United States* v. *Delaware & Hudson Co.,* 213 U. S. 366.[123]

Finally, despite the constant assertions that the orders in question will destroy property (*e. g.,* Am. Br., pp. 25, 38, 42–43) and the extravagant analogies between the effect of these orders and the taking of human life (Elec. Br., p. 38, Am. Br., p. 36), there is no more basis for assuming that compliance with the orders will have an adverse effect on values than there is in the case of the orders involved in the North American and Engineers cases.[124]

[123] American's attempts to distinguish these cases (Amer. Br., p. 37, n. ** carrying over to p. 39) assume that Section 11 is different because it is a penal and retroactive statute, an assumption which as we have seen is unfounded. The parallel between the present orders and the regulations involved in the cited cases is exact.

[124] See pp. 102–124, *supra.* Further, as of September 3, 1945, the Outlook (Vol. 17, No. 36, section 1, page 602) stated with reference to American Power and Light that "All the

(c) *Delegation of Power*

Petitioners argue (Amer. Br. 60–85) that the Act contains inadequate standards to guide the Commission in determining when the "corporate structure or continued existence of any company in the holding-company system does * * * unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system"; and they also complain that no standards have been developed or announced by the Commission which justify its action in this case. Apparently petitioners' contention is that

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issues should be worth materially more than current prices in any final settlement of this complicated situation, whether from the standpoint of all the present properties or whether the northern units are disposed of and only the southwestern companies are retained."

In the present case, as in the *North American* and *Engineers* cases, estimated liquidating values of the common stock, as computed and reported by Outlook, compare favorably with market values. This is exceptional in view of the extreme complexity and leverage position which add a speculative advantage to the common stock which is reflected in the market prices. Nevertheless, Outlook reports as of September 24, 1945 (Volume 17, No. 39, page 566) a liquidating value of $8.50 for American Power & Light common as compared to a market price of $7¾. Electric Power & Light common shows a liquidating value of $12.90 and a market price of $13. Of course the preferred stocks' liquidating values far exceed their present market prices. At some times in the past when the common stocks were under water and before the occurrence of improved conditions and improved financial policies in conformity with the Act, those stocks of course had a market price reflecting the speculative possibilities resulting from their leverage position.

either Congress or the Commission should have reduced the problem of simplifying complex holding company structures or removing unfairness in voting power to rules of thumb similar to the so-called "great grandfather clause" of Section 1 (b) (2) under which the Commission has no discretion to permit the continuation of more than two tiers of holding companies over any one operating company. Obviously there is a practical difference between fixing by such a rule of thumb the extreme limit of piling one holding company upon another,[125] and determining by mechanical formulae just when a particular holding company structure contains undue or unnecessary complexity.

Standards requiring the elimination of undue and unnecesary complexity and inequitable distribution of voting power, both by themselves and in the defined scope and expressed purposes of the Holding Company Act, afford far more definitely ascertainable criteria than the standard

[125] A situation where a three-tier holding company system might not involve undue or unnecessary complexity is where a holding company is necessary to maintain common control over two or more operating companies which are parts of a single integrated system but operate in more than one State, and where one of the operating companies has a relatively small subsidiary which there is some practical reason to keep as a separate corporation but where no significant pyramiding is involved. In some instances the subsidiary of the subsidiary might be a generating company separately incorporated to facilitate joint control with an operating company in another holding company system.

of public interest which this Court has found a sufficient guide to the Interstate Commerce Commission in passing on consolidations under the Transportation Act, 1920. See *New York Central Securities Corp.* v. *United States,* 287 U. S. 12, at 24–25, where it is stated "that the term 'public interest' as thus used is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities, questions to which the Interstate Commerce Commission has constantly addressed itself in the exercise of the authority conferred. So far as constitutional delegation of authority is concerned, the question is not essentially different from that which is raised by provisions with respect to reasonableness of rates, to discrimination, and to the issue of certificates of public convenience and necessity * * *".

While the Securities and Exchange Commission, unlike the Interstate Commerce Commission, is a relatively new administrative agency, the background of evils revealed in the legislative studies, the express recital of evils in Section 1 of the Act, the standards for new security issues laid down in Section 7, the conditions for acquisitions of properties and securities prescribed in Section 10, the nature of the inquiry envisioned by Section 11 (a), and indeed the background of other federal regulatory legislation, including the

Interstate Commerce Act, all tend to illuminate the standards in the Act itself. Compare also the requirements of Section 77B (f) and Chapter X, section 174, of the Bankruptcy Act that a plan must be "feasible", and the broad discretion which Section 77 (d) of the Bankruptcy Act gives the Interstate Commerce Commission in determining whether the financial structure of a reorganized railroad is "compatible with the public interest." See *Ecker* v. *Western Pacific R. R. Corp.*, 318 U. S. 448, 473.

Petitioners' complaint of undue delegation seems disingenuous in view of the legislative history. As the Act proceeded through the Committees and the two Houses of Congress there was consistent objection by utility representatives that the hands of the Commission were being tied too tightly and not enough discretion was allowed.[126] That indeed was the view of the then President of Bond and Share, who objected to the original bill as putting the companies "in a straight-jacket," and he went so far as to advise the House Committee "to state general objectives and not a specific method, because conditions change so frequently." In fact, with regard to his recommen-

[126] See, for example, Statement of Wendell L. Willkie, Hearings before the Committee on Interstate Commerce, United States Senate, Seventy-fourth Congress, First Session, on S. 1725, p. 598; Statement of Henry L. Harriman, Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 74th Congress, 1st Session, on H. R. 5423, Part II, p. 1559.

dation for the elimination of intermediate companies, he could suggest no standard more definite than "the public interest." [127]

[127] See the testimony of S. R. Inch, president of Bond and Share, as follows:

"Mr. LEA (interposing). Well, would you be willing to leave to the regulatory body the question of whether or not an intermediate holding corporation should be permitted to continue?

"Mr. INCH. Yes; I would. I would be willing to leave anything to a regulatory authority from whose decision there is a proper appeal allowed. I do not think that any commission of five men, let us say, who must necessarily be tremendously busy with a great many other things than that, should be given the power of life and death, with no appeal, and this bill provides for no appeal; there is no appeal from the facts as found by the commission.

"Mr. LEA. Now, if we leave that to the commission, or the regulatory body, of course, there are a good many things to be determined.

"Mr. INCH. Yes.

"Mr. LEA. The question of whether or not an intermediate company is to be removed would involve several things. What kind of procedure do you think should be provided to take care of that situation?

"Mr. INCH. *I would think, Mr. Lea, first of all that there should be some affirmative showing that the public interest is going to be served by its removal.*

"Mr. LEA. *You would be willing to leave that to the regulatory body?*

"Mr. INCH. *If its decision were subject to a reasonable review; yes.*

"Mr. LEA. Well, what kind of a yardstick would you give to the commission to determine just what kind of a company should be permitted to exist?

"Mr. INCH. *I should think you would not attempt, as this bill does, to put that in a straight-jacket, because con-*

Nor is there any substance to the complaint that the Commission has applied the statutory standards as prescribed by Congress on a case-by-case basis rather than by imposing rules of thumb which would be less flexible in their application. Cf. *Pittsburgh Plate Glass Co.* v. *N. L. R. B.*, 313 U. S. 146, 165–166. The most likely consequence of a rule of thumb would be to serve as a focus for arguments that the more particular standard was arbitrary and unreasonable just because it lacked flexibility. Cf. *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 224–225.

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ditions change so fast, and I would suggest that the wise thing to do would be to state general objectives and not a specific method, because conditions change so frequently.

"Mr. LEA. Then, you would give authority to the regulatory body to determine what company was to continue, and what would be the fact, or what would be the reason upon which they should discriminate as between the one that is to continue and the one that is to be removed; that is one of the things they would have to do.

"Mr. INCH. Yes.

"Mr. LEA. Now, have you anything in mind, any particular standard or rule that should be set up to govern the determination of the commission?

"Mr. INCH. *Well, I can think of nothing, Mr. Lea, beyond the matter that they are dealing with a public question.*" (Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 74th Congress, 1st Session, on H. R. 5423, Part 2, p. 1216; see also *id.* at 1220.)

IV

THE COURT BELOW PROPERLY REFUSED TO CONSIDER CONTENTIONS NOT ADVANCED BEFORE THE COMMISSION AND IN ANY EVENT THESE CONTENTIONS HAVE NO MERIT

A. *The Contentions Are Not Properly Before the Court*

Section 24 (a) of the Act provides that:

> No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do.

On the basis of this provision the court below properly refused to consider the following arguments made by petitioners which were not raised before the Commission (R. 875–876):

(a) "that § 11 (b) (2) does not as a matter of statutory interpretation authorize the dissolution of subholding companies as one method of bringing a holding company system into compliance with that subsection";

(b) "that petitioners are legally incapable of complying with the order of dissolution because dissolution can be effectuated only by a vote of the stockholders in pursuance of procedure prescribed by state law";

(c) "that the orders are not in accordance with § 11 (b) (2) in that they fail to prescribe the 'steps' which petitioners must take to effectuate compliance with the statutory requirements"; and

(d) "that the orders operate in effect to deprive petitioners of the benefit of the one-year period

granted by § 11 (c) within which to comply with the orders".

Petitioners presently press only the first of these contentions. They argue that the point was in fact raised by reference to an amended answer filed in 1940 (Am. Br. p. 108). However, the vague and general language referred to is in striking contrast to the treatment given the contentions actually raised, for all such contentions are dealt with in the Commission's opinion and petitioners stated in their petitions for rehearing that all their contentions "have been fully stated in the record and are dealt with by the Commission in its said findings and opinion" (R. 673–677).[128]

Petitioners seek to avoid the application of the requirement of Section 24 (a) by contending that there was reasonable ground for their failure to raise the foregoing contentions before the Commission because the Commission "had already uniformly held that it did have power to dissolve corporations" under 11 (b) (2) (Amer. Br. 109).[129]

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[128] See also the similar statements in the stipulation waiving filings of requests for findings, etc. (R. 520–522). In the Circuit Court of Appeals petitioners did not dispute the Commission's statement that they had not raised this question before the Commission.

[129] It should be noted that petitioners did urge before the Commission questions as to the constitutionality of Section 11 (b) (2) (R. 346–348, 355–356), although the Commission had frequently announced that it would not pass upon objections involving the constitutionality of the statutes it administers. See cases cited in *North American Company*, 11 S. E. C. 194, 198.

But Section 24 (a) will not serve its obvious purpose of requiring exhaustion of administration remedies unless the Commission is given the opportunity to reconsider its own precedents when there is objection to them, and also to determine whether even without such reconsideration it may be appropriate to eliminate a particular controversial issue from a case in the interest of avoiding litigation.

We include here a discussion of the contention upon which the court below refused to pass so that if this Court should conclude that the scope of review has been unduly limited it will be in a position to consider the merits of this contention—a course we believe is preferable to a remand to the court below, in view of the express Congressional desire that Section 11 (b) of the Act be effectuated as soon as practicable and in view of the "considerable period" already covered by this litigation. Cf. *Boston and Maine R. R.* v. *Gokey,* 210 U. S. 155, 162. See also *Dismuke* v. *United States,* 297 U. S. 167, 173; *Cole* v. *Ralph,* 252 U. S. 286, 289–290. To remand the case for consideration of these issues by the circuit court of appeals would not only unduly protract this litigation, it would doubly defeat the purpose of Section 24 (a), for petitioners would not only be able to withhold their arguments from the Commission, but in addition would further delay enforcement of the Act by having their appellate

review broken up into a multiplicity of stages. Such a course would moreover encourage a deliberate withholding of points for purposes of delay. Accordingly, we urge that if the Court is of the opinion that any of the contentions not passed on by the court below are properly subject to review, this Court should hear such arguments on the merits and decide them without a remand.

B. *Dissolution of Holding Companies Is Authorized By Section 11 (b) (2)*[130]

Section 11 (b) (2) provides that the Commission shall require each registered holding company to "take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or un-

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[130] Not only have petitioners failed to raise this point before the Commission but they have previously taken a position inconsistent with their present contention. Petitioners and Bond and Share in their brief before this Court in *Electric Bond and Share Company* v. *Securities and Exchange Commission*, 303 U. S. 419, referred to Section 11 as the "widely advertised *death sentence*" and as the provision relating "to the reorganization or *dissolution* of holding company systems" and they stated that "the Act directs the Commission to require all the major holding company defendants (with the possible exception of American Gas) to reorganize or *dissolve*" (pp. 34, 47 and 110; italics supplied). Similarly, as we pointed out at p. 37, *supra*, in their answer filed in that suit, these petitioners stated that enforcement of the Act would "leave them with no alternative but to dissolve." Com. Ex. 69, Vol. I, p. 177.

necessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding company system." Petitioners contend that the phrase "in the holding-company system" limits the authority of the Commission to orders removing a particular company from the holding company system of which it is a part, and does not permit an order terminating its existence. The plain intent of the statute precludes petitioners' construction.

It is clear not only from the first sentence of Section 11 (b) (2), quoted above, but also from other provisions of the statute that Congress gave the Commission "power to compel the elimination of holding companies deemed uneconomic." See *Otis & Co.* v. *Securities and Exchange Commission,* 323 U. S. 624, 637. Section 1 (c) declares it to be the policy of the Act, "in accordance with which policy all the provisions of this title shall be interpreted, * * * to provide as soon as practicable for the *elimination* of public-utility holding companies except as otherwise expressly provided in this title" [italics supplied]—that is, except insofar as the continued existence of a particular holding company will not violate the standards of Section 11 (b). The last sentence of Section 11 (b) (2) provides: "Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall author-

ize the Commission to require any *change* in the corporate structure or *existence* of any company which is not a holding company * * *" [italics supplied], an unnecessary provision if the subsection did not authorize changes in the existence of constituent companies in the holding company system. Thus, when the Commission finds that the structure of a holding company system is unduly complicated by the "continued existence" of one of the constituent companies, or that voting power is unfairly and inequitably distributed among the security holders of the holding company system by reason of the "continued existence" of that company, an appropriate if not the only method to "ensure" compliance with the statutory standards is by requiring that such company cease to exist.

Moreover, an examination of the grammatical structure of the first sentence of Section 11 (b) shows the error of petitioners' construction. It is apparent, from the entire clause "corporate structure or continued existence of any company in the holding-company system", that the phrase "in the holding-company system" necessarily bears the same function with reference to "corporate structure" as it does with "continued existence". Since this phrase obviously cannot modify "corporate structure" it cannot modify "continued existence", as petitioners claim, but

serves merely to modify and identify the word "company." [131]

The legislative history relied on by petitioners to bolster their position actually supports the contrary interpretation required by the face of the statute. Petitioners argue that, since the earlier drafts of the Senate bill (S. 2796) specifically provided that the Commission could require holding companies and their subsidiaries "to be reorganized or dissolved," and since in conference

[131] The words "any company in the holding-company system" were simply substituted for the words "such company" in an earlier draft of the section. See Section 11 (b) (2) of S. 2796, referred to in Amer. Br. pp. 110–111, note *. The fact that the substitute was not specifically adverted to in the conference report on the bill as passed (H. Rep. No. 1903, 74th Cong., 1st sess., 1935) indicates that no change of substance was intended. See *Jersey Central Power and Light Company* v. *Federal Power Commission*, 319 U. S. 61, 76, 77.

Moreover, the last sentence in Section 11 (b) (2) limiting the Commission's power to require "any change in the corporate structure or existence of any company which is not a holding company * * *" does not contain the phrase "in the holding-company system."

Petitioners make a similar contention with respect to the word "elimination" used in Section 1 (c) (Amer. Br. 111–112). The word "elimination" may carry the connotation of removal or dissolution according to its context. The context in which it is used in Section 1 (c) makes it clear that it was intended to mean "dissolution." In the same section, when the reference is to the disposition of "properties detrimental to the proper functioning" of the systems, the language is "to compel * * * the elimination *therefrom* [from the systems]." But, in providing for "elimination" of holding companies, the words indicating separation rather than dissolution are significantly absent.

this provision was changed to its present form, the Congress intended to withdraw the Commission's power to require dissolution (Am. Br., p.110 and note * thereto, and cf. Elec. Br., 38). An examination of the legislative history, however, not only fails to bear out the petitioners' contention, but strongly confirms the Commission's view.

The first public utility holding company bill which passed either House was S. 2796 (74th Cong., 1st Sess.). Section 11 (b) (2) of that bill was similar to the first sentence of the present Section 11 (b) (2), except that (as pointed out by the petitioners) it was mandatory that the Commission require each registered holding company and subsidiary "to be reorganized or dissolved" when the Commission found that it violated the standards of that section. Similarly, Section 11 (e) permitted a voluntary plan "for the divestment of control, securities, or other assets, or for the reorganization or dissolution, of such company or any subsidiary company," to meet the standards of Section 11 (b). The bill also contained a Section 11 (b) (3), which provided that within five years all holding companies should cease to be holding companies unless the equivalent of a certificate of convenience and necessity were obtained from the Federal Power Commission.

The elimination of this Section 11 (b) (3) was insisted upon by the House, and the bill which was

reported out by the conference committee and became law omitted that section of S. 2796.[132] It

[132] In their briefs below petitioners made much of the fact that Congressman Mott, who opposed the original S. 2796, spoke in favor of the conference amendment because he said "it effectively eliminates the so-called 'death sentence.'" An examination of the speech made by Mr. Mott makes it clear that what he meant by the "death sentence" was the elimination of all holding companies at the end of five years, provided for in the old Section 11 (b) (3). Thus he stated (Cong. Rec., vol. 79, part 13, pp. 14,169–14,170):

"* * * there was and still is only one real controversial feature in the entire Wheeler-Rayburn bill, * * * and that was and still is subdivision B (3) of section 11 of the Senate version which contained the 'death clause.'

* * * * *

"Again, with the single exception of subdivision B (3), which contained the unconditional, nonreviewable, and unappealable 'death sentence', the remaining portions even of section 11 of the House and Senate bills are identical.

* * * * *

"* * * The sole issue upon the motion to substitute the House for the Senate bill on July 2 arose over the proposed inclusion of subdivision B (3) of section 11 of the Senate bill, * * *.

* * * * *

"The compromise substitute makes judicial review mandatory and does not permit any order to become effective unless the court approves it. We objected to Senate provision B (3), because it arbitrarily put out of business every holding company, without respect to the degree of its remoteness from the operating company, without regard as to whether it was lawful or unlawful, and regardless of whether it was good or bad or whether it was a necessary or an unnecessary holding company."

These last remarks make it clear that Congressman Mott understood that under the conference amendment the Commission was authorized to put a holding company "out of business," but only if it was a "bad" or "unnecessary" holding company.

also changed Section 11 (b) (2) so that, as we have seen, instead of specifying reorganization or dissolution as the remedies, the choice of remedy was left entirely to the Commission, which was to require "such steps" as it might find necessary "to ensure" compliance with the statutory standards. Similarly, Section 11 (e) was changed to permit a voluntary plan, "for the divestment of control, securities, or other assets or for other action by such company or any subsidiary company", to meet the standards of Section 11 (b).

The net result of the compromise between the two houses, therefore, was (1) to delete the *unconditional* provision for the elimination of all holding companies at the end of five years; (2) to substitute the "great-grandfather clause" as a rule of thumb for extreme cases of pyramiding, with the effect of unconditionally eliminating all holding companies beyond the second degree;[133] and (3) to give the Commission, for the rest, flexibility to determine the steps necessary to ensure com-

[133] The "great-grandfather clause," which is the second sentence of Section 11 (b) (2), reads as follows:

"In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company."

pliance by any given holding company with the statutory standards. In other words, the compromise enacted into law by no means forbade dissolution, but simply placed in the hands of the Commission the determination of the steps necessary to ensure compliance with the statutory standards—be the result of those steps liquidation, simplification of the company's capital structure or some other type of reorganization.[134]

Indeed, since Section 11 (b) (2) as first passed by the Senate specifically referred both to *reorganization* and *dissolution,* and since the section as finally enacted contains no specific reference to either reorganization or dissolution, the petition-

[134] See also *In re Standard Gas and Electric Company* (C. C. A. 3, Sept. 14, 1945) where the court said (at p. 4 of the slip opinion):

"It needs no semanticist to be aware that the words 'other action' are broader in meaning than the more connatative and precisely denotative words 'reorganization or dissolution'".

The petitioners' argument is also inconsistent with the fact that Section 1 (c) in both the original S. 2796 and the final Act refers to the "elimination" of holding companies. Section 1 (c) of S. 2796 declares it to be the policy of the Act "to provide at the end of five years for the elimination of the public-utility holding company except as otherwise expressly provided in this title." Section 1 (c) of the Act declares it to be the policy of the statute "to provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided in this title." If "elimination" in Section 1 (c) of S. 2796 included dissolution, there seems no reason why the same word in the same context does not have the same meaning in Section 1 (c) of the Act itself.

ers' argument, if valid, would also deprive the Commission of any power to *reorganize* a holding company whose corporate structure is found to violate the statutory standards. However, if the Commission had no power to compel reorganization or dissolution of holding companies, it would be powerless to "ensure" that the statutory standards relating to complex corporate and system structure are met, and these standards would be nullified. Cf. *In re Standard Gas and Electric Company*, p. 163, *supra* (p. 5 of slip opinion).

In practice, the Commission has entered dissolution orders under Section 11 (b) (2) against numerous holding companies, including National Power and Light Company, petitioner's sister company (see p. 19, *supra*), and such other large holding companies as *United Light and Power Co.*, 8 S. E. C. 837;[135] *North American Light and Power Co.*, 10 S. E. C. 924; *Standard Power and Light Corp.*, 11 S. E. C. 689; *Central and Southwest Utilities Co.*, 11 S. E. C. 533; *International Hydro-Electric System*, 11 S. E. C. 888; and *Inter-*

[135] In a dictum in a case arising in the course of a liquidation of United Light and Power Co., the Circuit Court of Appeals for the Second Circuit referred to the Commission's order requiring liquidation and dissolution as being "clearly within the scope of the statute under which the Commission acted." *New York Trust Co.* v. *Securities and Exchange Commission*, 131 F. 2d 274, 275, certiorari denied, 318 U. S. 786. The effect of the order in that case was considered in *Otis & Co.* v. *S. E. C.*, 323 U. S. 624.

national Utilities Corporation, — S. E. C. —, Holding Company Act Release No. 4270 (1943).[136] Under the circumstances, the administrative practice is entitled to weight. *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 315.[137]

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[136] Apart from the instant cases review has been sought from the Commission's orders of dissolution only in connection with Central and Southwest Utilities Co. and International Hydro-Electric system. In neither of these cases, however, was the Commission's right to terminate the existence of a holding company questioned. In each case the Commission's dissolution order was sustained. See *Central and South West Utilities Co.* v. *Securities and Exchange Commission*, 136 F. 2d 273 (App. D. C.); and *Todd* v. *Securities and Exchange Commission*, 137 F. 2d 475 (C. C. A. 6).

[137] See also *United States* v. *American Trucking Associations, Inc.*, 310 U. S. 534, 549; *Skidmore* v. *Swift & Company*, 323 U. S. 134, 140; and *Securities and Exchange Commission* v. *Associated Gas & Electric Company*, 99 F. 2d 795, 798 (C. C. A. 2).

In the last cited case, Judge A. N. Hand, in speaking of the Act herein involved, pointed out, at p. 798: "* * * we are dealing with a new act the administration of which is the peculiar function of the Securities and Exchange Commission. One of the principal reasons for the creation of such a bureau is to secure the benefit of special knowledge acquired through continuous experience in a difficult and complicated field. Its interpretation of the act should control unless plainly erroneous. In no other way can the objects of the act be attained without constant and disconcerting friction."

CONCLUSION

For the reasons stated, the judgment below should be affirmed.

Respectfully submitted.

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NOVEMBER 1945.

APPENDIX A

The Public Utility Holding Company Act of 1935, c. 687, 49 Stat. 803, 15 U. S. C., sec. 79 *et seq.*, provides in pertinent part as follows:

TITLE I—CONTROL OF PUBLIC-UTILITY HOLDING COMPANIES

NECESSITY FOR CONTROL OF HOLDING COMPANIES

SECTION 1. (a) Public-utility holding companies and their subsidiary companies are affected with a national public interest in that, among other things, (1) their securities are widely marketed and distributed by means of the mails and instrumentalities of interstate commerce and are sold to a large number of investors in different States; (2) their service, sales, construction, and other contracts and arrangements are often made and performed by means of the mails and instrumentalities of interstate commerce; (3) their subsidiary public-utility companies often sell and transport gas and electric energy by the use of means and instrumentalities of interstate commerce; (4) their practices in respect of and control over subsidiary companies often materially affect the interstate commerce in which those companies engage; (5) their activities extending over many States are not susceptible of effective control by any State and make difficult, if not impossible, effective State regulation of public-utility companies.

(b) Upon the basis of facts disclosed by the reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session), the reports of the Committee on Interstate and Foreign Commerce, House of Representatives, made pursuant to H. Res. 59 (Seventy-second Congress, first session) and H. J. Res. 572 (Seventy-second Congress, second session) and otherwise disclosed and ascertained, it is hereby declared that the national public interest, the interest of investors in the securities of holding companies and their subsidiary companies and affiliates, and the interest of consumers of electric energy and natural and manufactured gas, are or may be adversely affected—

(1) when such investors cannot obtain the information necessary to appraise the financial position or earning power of the issuers, because of the absence of uniform standard accounts; when such securities are issued without the approval or consent of the States having jurisdiction over subsidiary public-utility companies; when such securities are issued upon the basis of fictitious or unsound asset values having no fair relation to the sums invested in or the earning capacity of the properties and upon the basis of paper profits from intercompany transactions, or in anticipation of excessive revenues from subsidiary public-utility companies; when such securities are issued by a subsidiary public-utility company under circumstances which subject such company to the burden of supporting an overcapitalized structure and tend to prevent voluntary rate reductions;

(2) when subsidiary public-utility companies are subjected to excessive charges

for services, construction work, equipment, and materials, or enter into transactions in which evils result from an absence of arm's-length bargaining or from restraint of free and independent competition; when service, management, construction, and other contracts involve the allocation of charges among subsidiary public-utility companies in different States so as to present problems of regulation which cannot be dealt with effectively by the States;

(3) when control of subsidiary public-utility companies affects the accounting practices and rate, dividend, and other policies of such companies so as to complicate and obstruct State regulation of such companies, or when control of such companies is exerted through disproportionately small investment;

(4) when the growth and extension of holding companies bears no relation to economy of management and operation or the integration and coordination of related operating properties; or

(5) when in any other respect there is lack of economy of management and operation of public-utility companies or lack of efficiency and adequacy of service rendered by such companies, or lack of effective public regulation, or lack of economies in the raising of capital.

(c) When abuses of the character above enumerated become persistent and widespread the holding company becomes an ageny which, unless regulated, is injurious to investors, consumers, and the general public; and it is hereby declared to be the policy of this title, in accordance with which policy all the provisions of this title shall be interpreted, to meet the problems

and eliminate the evils as enumerated in this section, connected with public-utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce; and for the purpose of effectuating such policy to compel the simplification of public-utility holding-company systems and the elimination therefrom of properties detrimental to the proper functioning of such systems, and to provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided in this title.

DEFINITIONS

SEC. 2. (a) When used in this title, unless the context otherwise requires—

* * * * *

(7) "Holding company" means—

(A) any company which directly or indirectly owns, controls, or holds with power to vote, 10 per centum or more of the outstanding voting securities of a public-utility company or of a company which is a holding company by virtue of this clause or clause (B), unless the Commission, as hereinafter provided, by order declares such company not to be a holding company; and

(B) any person which the Commission determines, after notice and opportunity for hearing, directly or indirectly to exercise (either alone or pursuant to an arrangement or understanding with one or more other persons) such a controlling influence over the management or policies of any public-utility or holding company as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that such person be

subject to the obligations, duties, and liabilities imposed in this title upon holding companies.

The Commission, upon application, shall by order declare that a company is not a holding company under clause (A) if the Commission finds that the applicant (i) does not, either alone or pursuant to an arrangement or understanding with one or more other persons, directly or indirectly control a public-utility or holding company either through one or more intermediary persons or by any means or device whatsoever, (ii) is not an intermediary company through which such control is exercised, and (iii) does not, directly or indirectly, exercise (either alone or pursuant to an arrangement or understanding with one or more other persons) such a controlling influence over the management or policies of any public-utility or holding company as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the applicant be subject to the obligations, duties, and liabilities imposed in this title upon holding companies. The filing of an application hereunder in good faith by a company other than a registered holding company shall exempt the applicant from any obligation, duty, or liability imposed in this title upon the applicant as a holding company, until the Commission has acted upon such application. Within a reasonable time after the receipt of any application hereunder, the Commission shall enter an order granting, or, after notice and opportunity for hearing, denying or otherwise disposing of, such application. As a condition to the entry of any order granting

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such application and as a part of any such order, the Commission may require the applicant to apply periodically for a renewal of such order and to do or refrain from doing such acts or things, in respect of exercise of voting rights, control over proxies, designation of officers and directors, existence of interlocking officers, directors and other relationships, and submission of periodic or special reports regarding affiliations or intercorporate relationships of the applicant, as the Commission may find necessary or appropriate to ensure that in the case of the applicant the conditions specified in clauses (i), (ii), and (iii) are satisfied during the period for which such order is effective. The Commission, upon its own motion or upon application of the company affected, shall revoke the order declaring such company not to be a holding company whenever in its judgment any condition specified in clause (i), (ii), or (iii) is not satisfied in the case of such company, or modify the terms of such order whenever in its judgment such modification is necessary to ensure that in the case of such company the conditions specified in clauses (i), (ii), and (iii) are satisfied during the period for which such order is effective. Any action of the Commission under the preceding sentence shall be by order.

* * * * *

(9) "Holding-company system" means any holding company, together with all its subsidiary companies, and all mutual service companies (as defined in paragraph (13) of this subsection) of which such holding company or any subsidiary company thereof is a member company (as defined in paragraph (14) of this subsection).

* * * * *

POWER TO MAKE PARTICULAR EXEMPTIONS REGARDING HOLDING COMPANIES, SUBSIDIARY COMPANIES, AND AFFILIATES

SEC. 3. (a) The Commission, by rules and regulations upon its own motion, or by order upon application, shall exempt any holding company, and every subsidiary company thereof as such, from any provision or provisions of this title, unless and except insofar as it finds the exemption detrimental to the public interest or the interest of investors or consumers, if—

(1) such holding company, and every subsidiary company thereof which is a public-utility company from which such holding company derives, directly or indirectly, any material part of its income, are predominantly intrastate in character and carry on their business substantially in a single State in which such holding company and every such subsidiary company thereof are organized;

(2) such holding company is predominantly a public-utility company whose operations as such do not extend beyond the State in which it is organized and States contiguous thereto;

(3) such holding company is only incidentally a holding company, being primarily engaged or interested in one or more businesses other than the business of a public-utility company and (A) not deriving, directly or indirectly, any material part of its income from any one or more subsidiary companies, the principal business of which is that of a public-utility company, or (B) deriving a material part of its income from any one or more such subsidiary companies, if substantially all

the outstanding securities of such companies are owned, directly or indirectly, by such holding company;

(4) such holding company is temporarily a holding company solely by reason of the acquisition of securities for purposes of liquidation or distribution in connection with a bona fide debt previously contracted or in connection with a bona fide arrangement for the underwriting or distribution of securities; or

(5) such holding company is not, and derives no material part of its income, directly or indirectly, from any one or more subsidiary companies which are, a company or companies the principal business of which within the United States is that of a public-utility company.

(b) The Commission, by rules and regulations upon its own motion, or by order upon application, shall exempt any subsidiary company, as such, of a holding company from any provision or provisions of this title, the application of which to such subsidiary company the Commission finds is not necessary in the public interest or for the protection of investors, if such subsidiary company derives no material part of its income, directly or indirectly, from sources within the United States, and neither it nor any of its subsidiary companies is a public-utility company operating in the United States.

(c) Within a reasonable time after the receipt of an application for exemption under subsection (a) or (b), the Commission shall enter an order granting, or, after notice and opportunity for hearing, denying or otherwise disposing of such application. The filing of an application in good

faith under subsection (a) by a person other than a registered holding company shall exempt the applicant from any obligation, duty, or liability imposed in this title upon the applicant as a holding company until the Commission has acted upon such application. The filing of an application in good faith under subsection (b) shall exempt the applicant from any obligation, duty, or liability imposed in this title upon the applicant as a subsidiary company until the Commission has acted upon such application. Whenever the Commission, on its own motion, or upon application by the holding company or any subsidiary company thereof exempted by any order issued under subsection (a), or by the subsidiary company exempted by any order issued under subsection (b), finds that the circumstances which gave rise to the issuance of such order no longer exist, the Commission shall by order revoke such order.

(d) The Commission may, by rules and regulations, conditionally or unconditionally exempt any specified class or classes of persons from the obligations, duties, or liabilities imposed upon such persons as subsidiary companies or affiliates under any provision or provisions of this title, and may provide within the extent of any such exemption that such specified class or classes of persons shall not be deemed subsidiary companies or affiliates within the meaning of any such provision or provisions, if and to the extent that it deems the exemption necessary or appropriate in the public interest or for the protection of investors or consumers and not contrary to the purposes of this title.

TRANSACTIONS BY UNREGISTERED HOLDING COMPANIES

SEC. 4. (a) After December 1, 1935, unless a holding company is registered under section 5, it shall be unlawful for such holding company, directly or indirectly—

(1) to sell, transport, transmit, or distribute, or own or operate any utility assets for the transportation, transmission, or distribution of, natural or manufactured gas or electric energy in interstate commerce;

(2) by use of the mails or any means or instrumentality of interstate commerce, to negotiate, enter into, or take any step in the performance of, any service, sales, or construction contract undertaking to perform services or construction work for, or sell goods to, any public-utility company or holding company;

(3) to distribute or make any public offering for sale or exchange of any security of such holding company, any subsidiary company or affiliate of such holding company, any public-utility company, or any holding company, by use of the mails or any means or instrumentality of interstate commerce, or to sell any such security having reason to believe that such security, by use of the mails or any means or instrumentality of interstate commerce, will be distributed or made the subject of a public offering;

(4) by use of the mails or any means or instrumentality of interstate commerce, to acquire or negotiate for the acquisition of any security or utility assets of any subsidiary company or affiliate of such holding company, any public-utility company, or any holding company;

(5) to engage in any business in interstate commerce; or

(6) to own, control, or hold with power to vote, any security of any subsidiary company thereof that does any of the acts enumerated in paragraphs (1) to (5), inclusive, of this subsection.

(b) Every holding company which has outstanding any security any of which, by use of the mails or any means or instrumentality of interstate commerce, has been distributed or made the subject of a public offering subsequent to January 1, 1925, and any of which security is owned or held on October 1, 1935 (or, if such company is not a holding company on that date, on the date such company becomes a holding company) by persons not resident in the State in which such holding company is organized, shall register under section 5 on or before December ~~1, 1935 or the thirtieth~~ day after such company becomes a holding company, whichever date is later.

* * * * *

SIMPLIFICATION OF HOLDING-COMPANY SYSTEMS

SEC. 11. (a) It shall be the duty of the Commission to examine the corporate structure of every registered holding company and subsidiary company thereof, the relationships among the companies in the holding-company system of every such company and the character of the interests thereof and the properties owned or controlled thereby to determine the extent to which the corporate structure of such holding-company system and the companies therein may be simplified, unnecessary complexities therein eliminated, voting power

fairly and equitably distributed among the holders of securities thereof, and the properties and business thereof confined to those necessary or appropriate to the operations of an integrated public-utility system.

(b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

(1) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system: *Provided, however,* That the Commission shall permit a registered holding company to continue to control one or more additional integrated public-utility systems, if, after notice and opportunity for hearing, it finds that—

(A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;

(B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country; and

(C) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of

localized management, efficient operation, or the effectiveness of regulation.

The Commission may permit as reasonably incidental, or economically necessary or appropriate to the operations of one or more integrated public-utility systems the retention of an interest in any business (other than the business of a public-utility company as such) which the Commission shall find necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems.

(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any

change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company.

The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist. Any order made under this subsection shall be subject to judicial review as provided in section 24.

* * * * *

(d) The Commission may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce compliance with any order issued under subsection (b). In any such proceeding, the court as a court of equity may, to such extent as it deems necessary for purposes of enforcement of such order, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction, in any such proceeding, to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer under the direction of the court the assets so possessed. In any proceeding for the enforcement of an order of the Commission issued under subsection (b), the trustee with the approval of the court shall have power to dispose of any or all of such assets and, subject to such terms and conditions as the court may prescribe, may make such disposition in accordance with a fair and equitable reorganization plan which shall have been approved by the Commission after opportunity for hearing.

Such reorganization plan may be proposed in the first instance by the Commission, or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization.

(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section

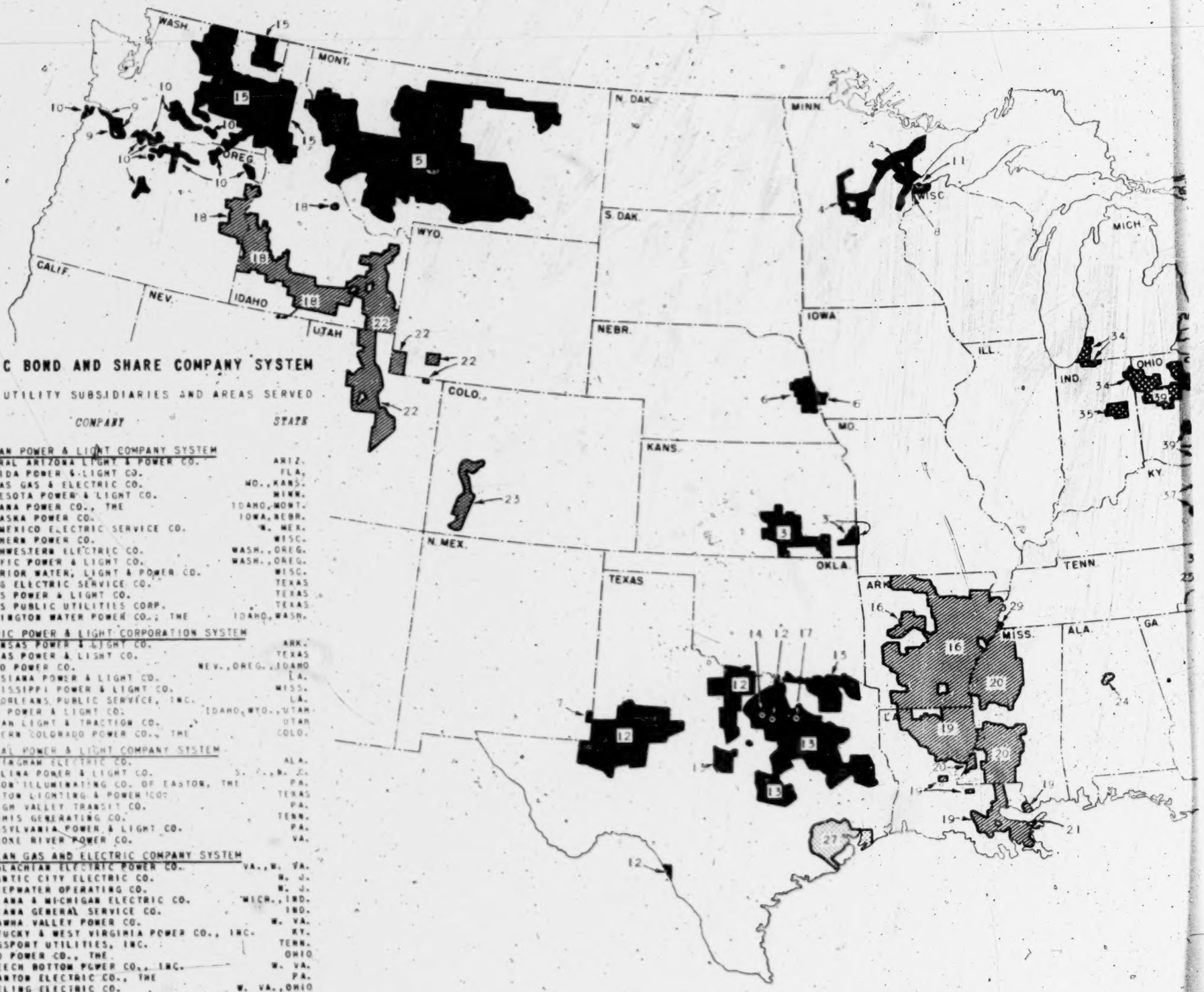
11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed.

* * * * *

COURT REVIEW OF ORDERS

SEC. 24. (a) Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm,

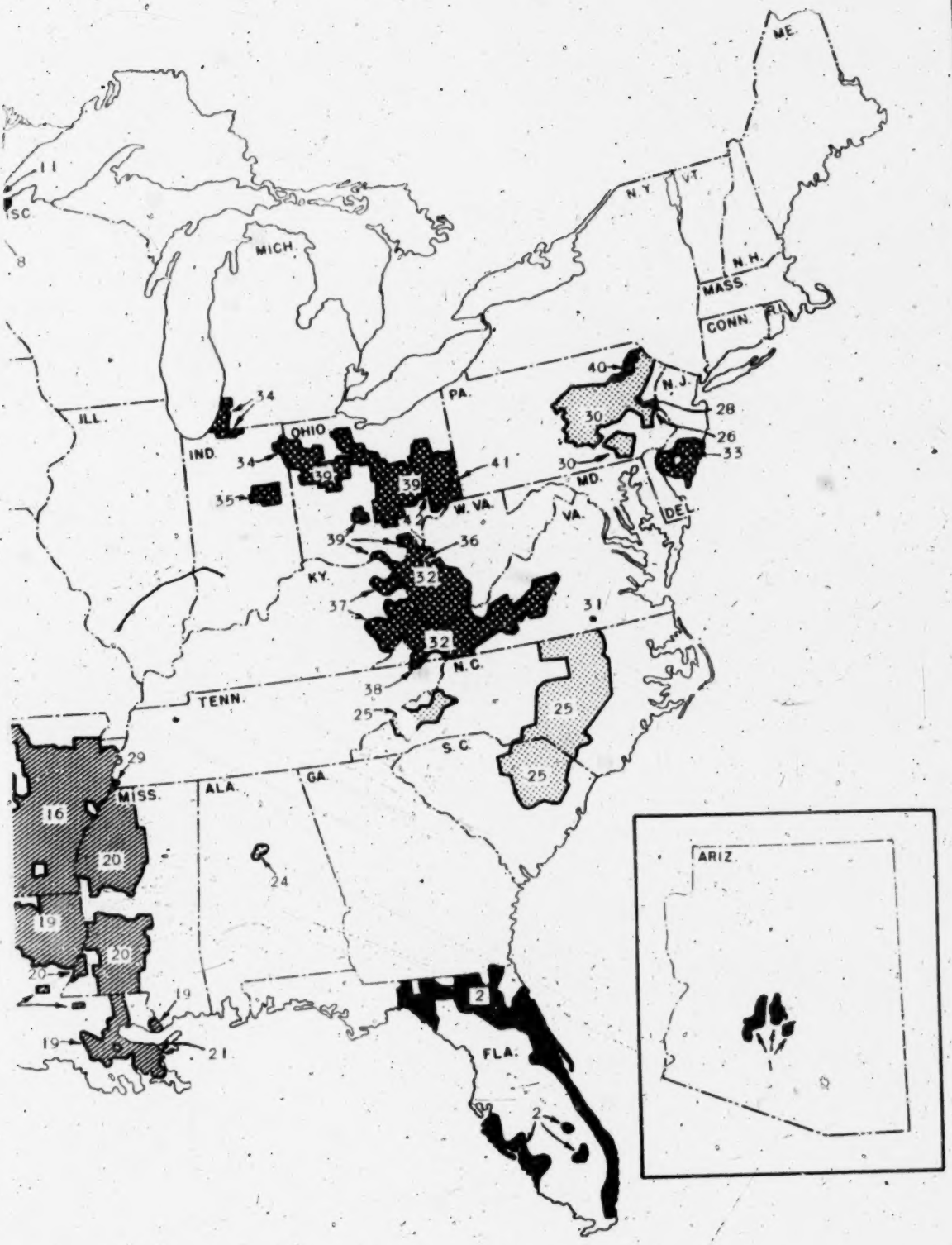
modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).



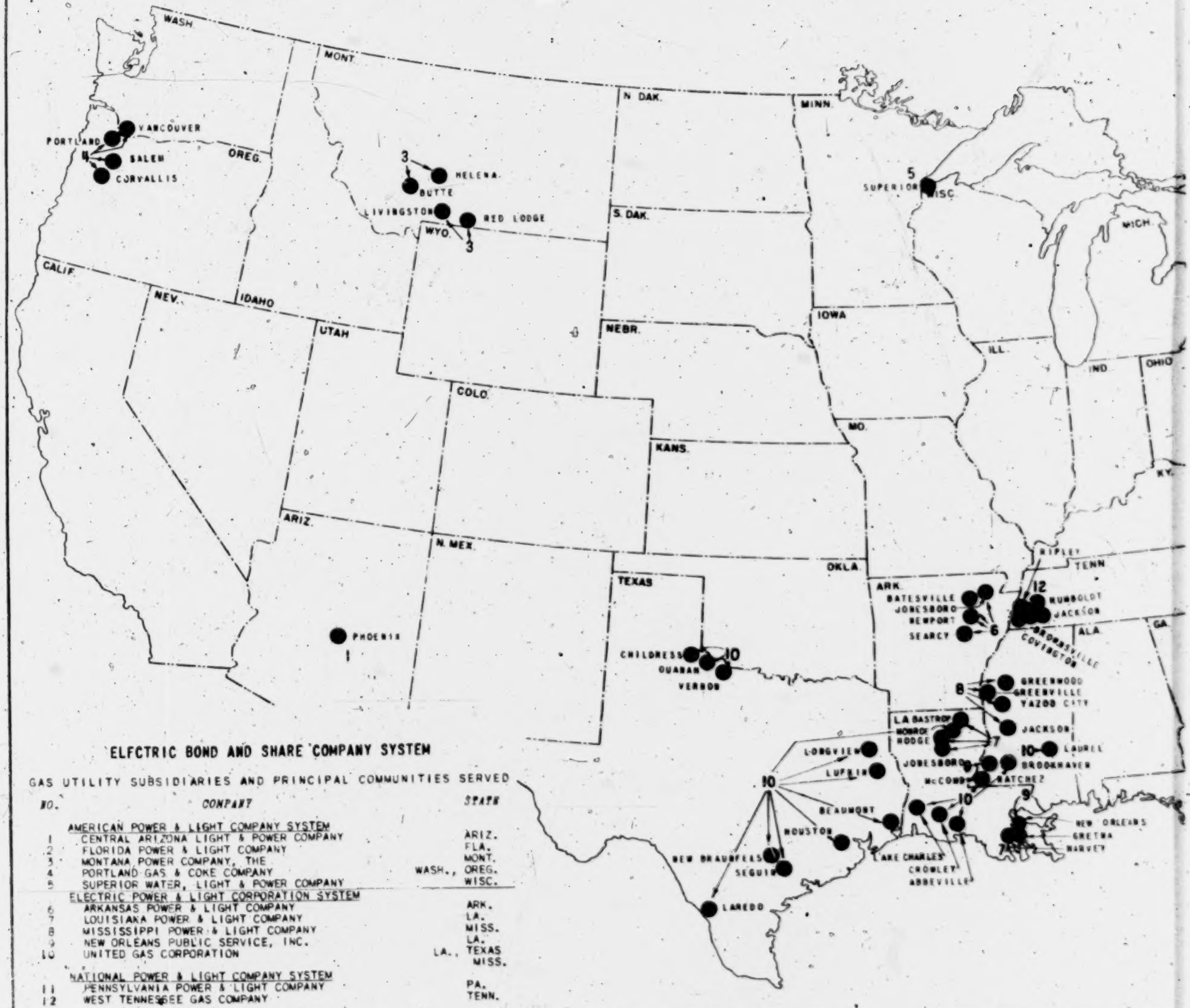
ELECTRIC BOND AND SHARE COMPANY SYSTEM

ELECTRIC UTILITY SUBSIDIARIES AND AREAS SERVED

NO.	COMPANY	STATE
	AMERICAN POWER & LIGHT COMPANY SYSTEM	
1	CENTRAL ARIZONA LIGHT & POWER CO.	ARIZ.
2	FLORIDA POWER & LIGHT CO.	FLA.
3	KANSAS GAS & ELECTRIC CO.	MO., KANS.
4	MINNESOTA POWER & LIGHT CO.	MINN.
5	MONTANA POWER CO., THE	IDAHO, MONT.
6	NEBRASKA POWER CO.	IOWA, NEBR.
7	NEW MEXICO ELECTRIC SERVICE CO.	N. MEX.
8	NORTHERN POWER CO.	WISC.
9	NORTHWESTERN ELECTRIC CO.	WASH., OREG.
10	PACIFIC POWER & LIGHT CO.	WASH., OREG.
11	SUPERIOR WATER, LIGHT & POWER CO.	WISC.
12	TEXAS ELECTRIC SERVICE CO.	TEXAS
13	TEXAS POWER & LIGHT CO.	TEXAS
14	TEXAS PUBLIC UTILITIES CORP.	TEXAS
15	WASHINGTON WATER POWER CO., THE	IDAHO, WASH.
	ELECTRIC POWER & LIGHT CORPORATION SYSTEM	
16	ARKANSAS POWER & LIGHT CO.	ARK.
17	DALLAS POWER & LIGHT CO.	TEXAS
18	IDAHO POWER CO.	NEV., OREG., IDAHO
19	LOUISIANA POWER & LIGHT CO.	LA.
20	MISSISSIPPI POWER & LIGHT CO.	MISS.
21	NEW ORLEANS PUBLIC SERVICE, INC.	LA.
22	UTAH POWER & LIGHT CO.	IDAHO, WYO., UTAH
	UTAH LIGHT & TRACTION CO.	UTAH
23	WESTERN COLORADO POWER CO., THE	COLO.
	NATIONAL POWER & LIGHT COMPANY SYSTEM	
24	BIRMINGHAM ELECTRIC CO.	ALA.
25	CAROLINA POWER & LIGHT CO.	S. C., N. C.
26	EDISON ILLUMINATING CO. OF EASTON, THE	PA.
27	HOUSTON LIGHTING & POWER CO.	TEXAS
28	LEHIGH VALLEY TRANSIT CO.	PA.
29	MEMPHIS GENERATING CO.	TENN.
30	PENNSYLVANIA POWER & LIGHT CO.	PA.
31	ROANOKE RIVER POWER CO.	VA.
	AMERICAN GAS AND ELECTRIC COMPANY SYSTEM	
32	APPALACHIAN ELECTRIC POWER CO.	VA., W. VA.
33	ATLANTIC CITY ELECTRIC CO.	N. J.
	DEEPWATER OPERATING CO.	N. J.
34	INDIANA & MICHIGAN ELECTRIC CO.	MICH., IND.
35	INDIANA GENERAL SERVICE CO.	IND.
36	KANAWHA VALLEY POWER CO.	W. VA.
37	KENTUCKY & WEST VIRGINIA POWER CO., INC.	KY.
38	KINGSPORT UTILITIES, INC.	TENN.
39	OHIO POWER CO., THE	OHIO
	BEECH BOTTOM POWER CO., INC.	W. VA.
40	SCRANTON ELECTRIC CO., THE	PA.
41	WHEELING ELECTRIC CO.	W. VA., OHIO
42	SOUTHERN OHIO PUBLIC SERVICE CO.	OHIO



DS-2293 PREPARED BY SECURITIES AND EXCHANGE COMMISSION

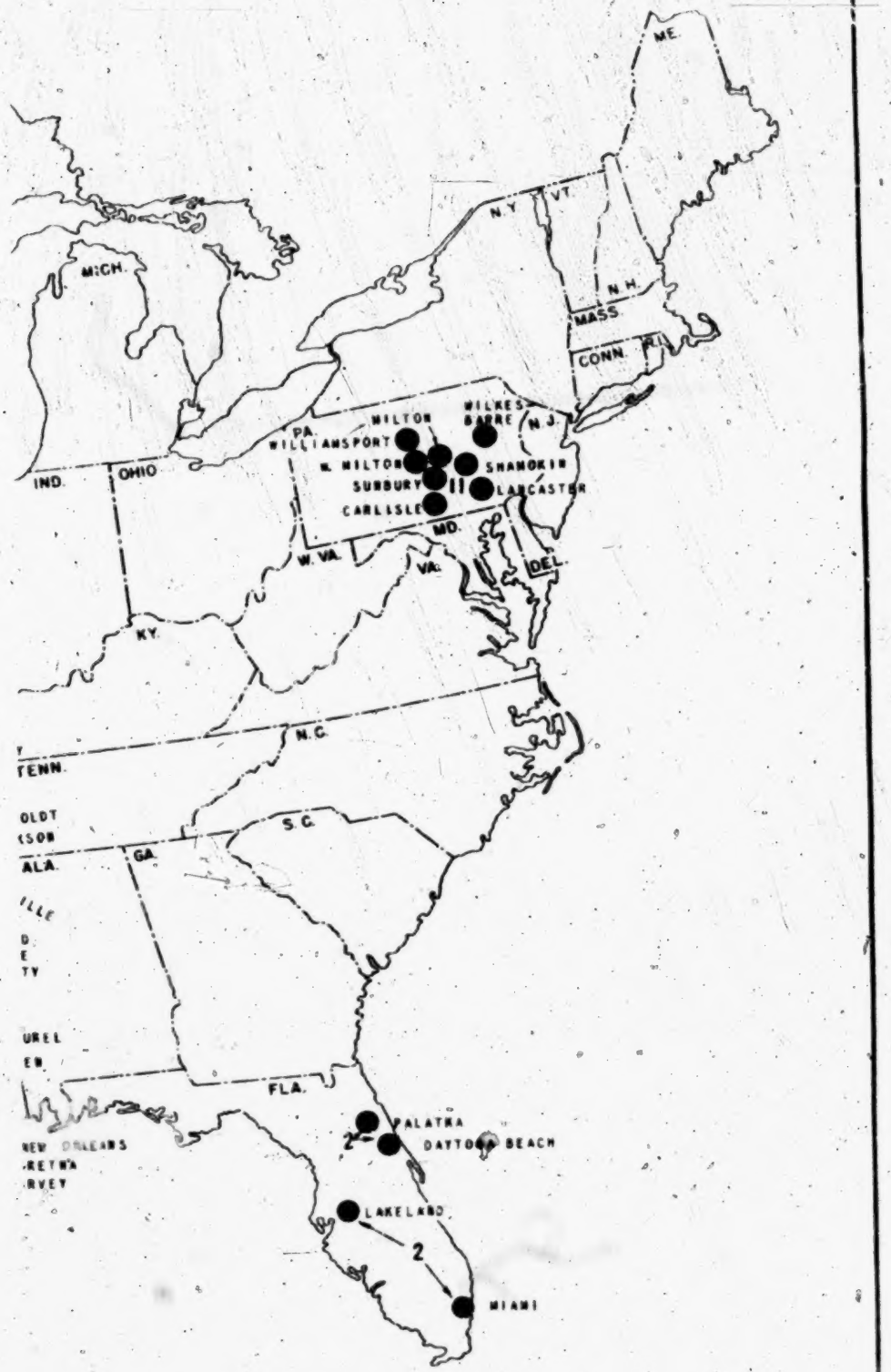


ELFCTRIC BOND AND SHARE COMPANY SYSTEM

GAS UTILITY SUBSIDIARIES AND PRINCIPAL COMMUNITIES SERVED

NO.	COMPANY	STATE
	AMERICAN POWER & LIGHT COMPANY SYSTEM	
1	CENTRAL ARIZONA LIGHT & POWER COMPANY	ARIZ.
2	FLORIDA POWER & LIGHT COMPANY	FLA.
3	MONTANA POWER COMPANY, THE	MONT.
4	PORTLAND GAS & COKE COMPANY	WASH., OREG.
5	SUPERIOR WATER, LIGHT & POWER COMPANY	WISC.
	ELECTRIC POWER & LIGHT CORPORATION SYSTEM	
6	ARKANSAS POWER & LIGHT COMPANY	ARK.
7	LOUISIANA POWER & LIGHT COMPANY	LA.
8	MISSISSIPPI POWER & LIGHT COMPANY	MISS.
9	NEW ORLEANS PUBLIC SERVICE, INC.	LA.
10	UNITED GAS CORPORATION	LA., TEXAS MISS.
	NATIONAL POWER & LIGHT COMPANY SYSTEM	
11	PENNSYLVANIA POWER & LIGHT COMPANY	PA.
12	WEST TENNESSEE GAS COMPANY	TENN.

APPENDIX C

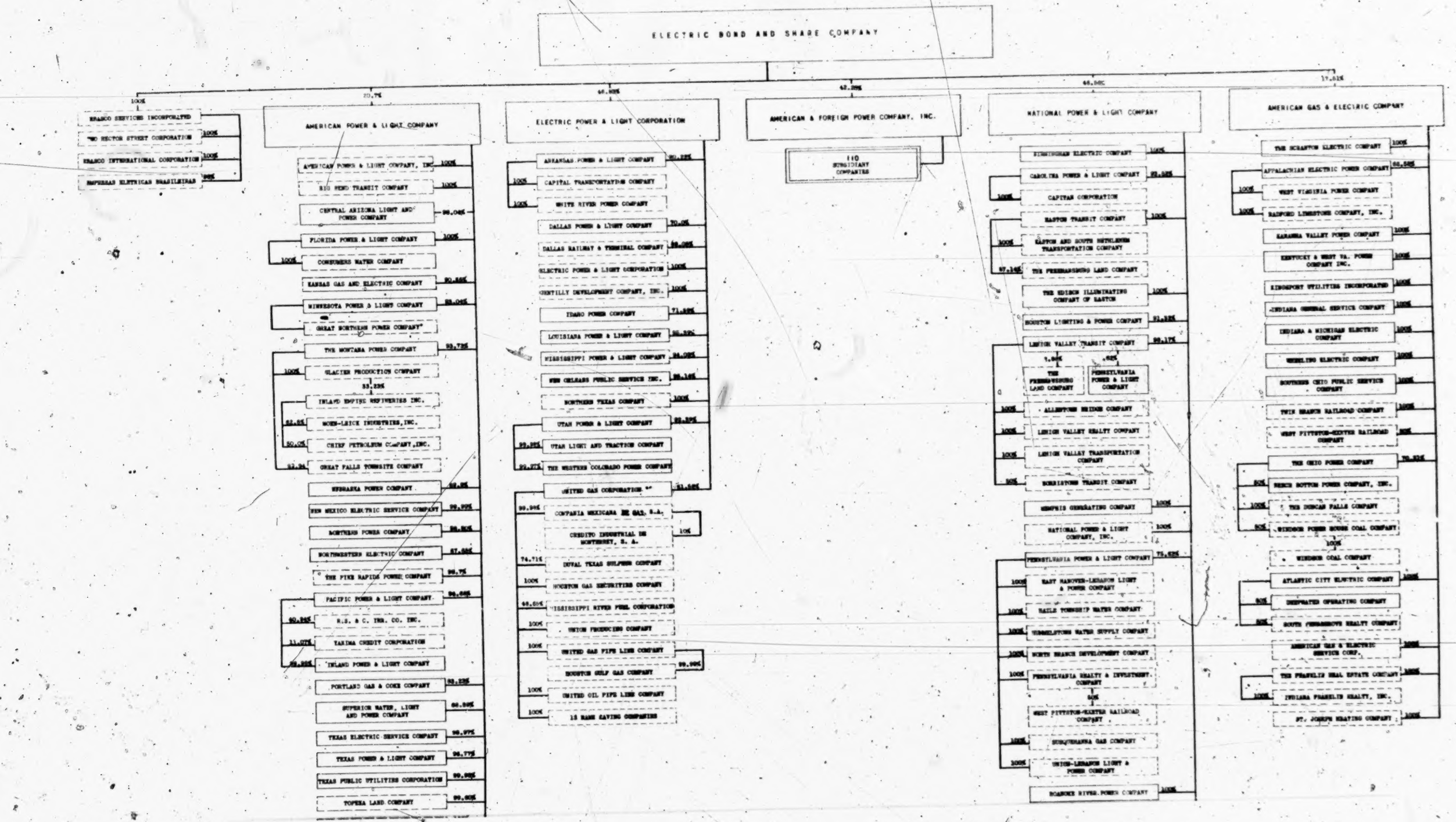


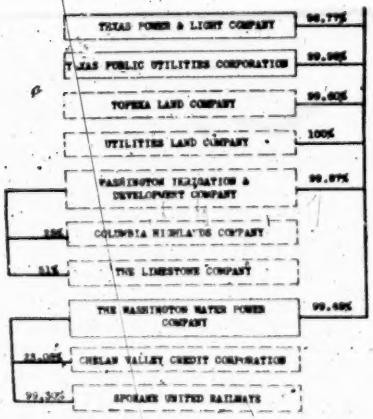
DS-1412 PREPARED BY SECURITIES AND EXCHANGE COMMISSION

APPENDIX D

ELECTRIC BOND AND SHARE COMPANY

CORPORATE CHART SHOWING PERCENTAGE OF VOTING POWER
AS OF DECEMBER 31, 1941



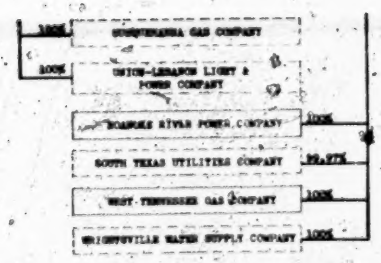


* OUTSTANDING SHARES HELD BY DIRECTORS

** ELECTRIC BOND AND SHARE COMPANY HAS A DIRECT VOTING INTEREST OF 7.19%

HOLDING COMPANY OR [illegible] SUBSIDIARY COMPANY

NON-UTILITY SUBSIDIARY COMPANY



APPENDIX E

STATEMENT OF GANSON PURCELL, CHAIRMAN, SECURITIES AND EXCHANGE COMMISSION, BEFORE THE COMMITTEE OF DEPRECIATION OF THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS WITH REFERENCE TO THE COMMITTEE'S 1943 DEPRECIATION REPORT (CHICAGO, ILL., MARCH 8, 1944)

On behalf of the Securities and Exchange Commission, I am very happy to take advantage of your invitation to present our views with respect to your 1943 Depreciation Report. The interest of the Securities and Exchange Commission in this subject stems not alone from our duties in administering the Public Utility Holding Company Act but also from our responsibilities under the Securities Act of 1933 and the Securities Exchange Act of 1934, and our functions in reorganization cases under Chapter X of the Bankruptcy Act as amended. The provisions of the Holding Company Act apply to some 52 utility holding company systems, which include 1,217 individual holding, sub-holding and operating companies. The total consolidated assets of these registered companies amount to approximately $16,000,000,000.

While we are interested in sound depreciation practice under each of the statutes I have mentioned, our powers and responsibilities under the Holding Company Act go far beyond the mere disclosure principles of the Securities Act and the Securities Exchange Act. Thus current accruals for depreciation and the size of the depreciation

reserve are matters of particular importance in the decisions that we have to make under the Holding Company Act. They enter into our judgment when we pass upon the issuance and sale of securities, the acquisition or sale of utility securities or assets, and plans of reorganization or recapitalization. Moreover under Section 12 (c) of the Holding Company Act, it is unlawful for any registered holding company or any of its subsidiaries to declare or pay any dividend on any of its securities in contravention of such rules and regulations or orders as the Commission deems necessary or appropriate to protect the financial integrity of companies in holding company systems, to safeguard the working capital of such public utility companies, or to prevent the payment of dividends out of capital or unearned surplus. It is clear that the availability of earnings for dividend distribution is directly affected by the adequacy or inadequacy of current accruals for depreciation and in certain extreme cases such availability may be affected by substantial deficiencies as to past provisions for depreciation. In administering these provisions, we believe it is important to determine whether depreciation is being accrued on a systematic basis related to reasonable estimates of service life.

Turning now to your 1943 Depreciation Report, let me compliment your Committee upon the great contribution that you have made to the literature on this important subject. We have reviewed your report with care and believe that you have presented a most comprehensive analysis of the principles of public utility depreciation. Your

statement of principles, both in the summary of your report and throughout the text, have been written with great clarity and you have exercised painstaking effort to avoid ambiguity and inconsistency. I express the unanimous opinion of the Securities and Exchange Commission when I say that we agree with your principal conclusions and recommendations. In particular, let me say that we believe that straight-line depreciation accounting for public utility companies is the most practicable and desirable method which has been suggested to date. We also feel that it is both practicable and sound to base straight-line computations on age-life studies of depreciable property as modified from time to time by actual experience.

We have considered the effects on investors and consumers of different methods of accruing depreciation and we have concluded that in addition to its other advantages, straight-line depreciation accounting affords greater financial stability to the business unit and greater financial security to the investor than retirement or compound interest methods. As stated in Chapter IX of your report, the depreciation reserve under the straight-line method builds up more rapidly in the earlier years and indeed throughout the life of the enterprise than it does under the interest methods. Accordingly, the use of the straight-line method tends to reduce risks for investors. Furthermore, the direct financial effect of the larger straight-line reserves as compared with compound interest reserves is to reduce the amount of securities that would otherwise be outstanding against the assets of the enterprise throughout its life. These are

important advantages. They signify more conservative financial policy than has frequently prevailed in the past. We, therefore, believe that the change-over to straight-line depreciation accounting will afford a greater protection of the financial integrity of public utility companies and thereby strengthen their credit standing.

There is one subject concerning which I should like to make special comment, namely, the problems involved in the change-over from retirement to straight-line depreciation accounting. On this subject, certain spokesmen of the public utility industry have expressed considerable apprehension lest the change-over be required in an unduly abrupt manner with adverse effects upon the credit of the companies. They have also urged that your recommendations would involve retroactive features unfair to investors from the point of view of rate regulation. The objections of the various industry committees are summarized in the memorandum submitted by the Depreciation Committee of the Edison Electric Institute as follows:

> "1. In accounting, the books of account would ordinarily be adjusted to conform with whatever theoretical computations are selected as 'proper'.
>
> "2. In financing or reorganization cases, the adjusted reserve as above, or an equivalent theoretical reserve computation, would be used in determining the amount of securities permitted to be issued or to remain outstanding.
>
> "3. In rate making proceedings, the theoretically computed reserve would be used as the measure of depreciation in establish-

ing a depreciated rate base; and a corresponding annual accrual on an age-life basis would be used in determining the allowed return."

These statements appear to give inadequate weight to certain passages in your report which clearly reflect your judgment that the objective of correcting inadequate reserves should be approached with due regard for what is equitable and feasible under all of the circumstances of the individual case.

While the three aspects of the change-over problem, namely, accounting, financing and rate making, are interrelated to a great extent, I shall confine my comments to the accounting and financing phases with respect to which we have had some experience under the Holding Company Act. Since we have no rate making duties, I shall not attempt to comment on that particular phase of the problem. As to the remaining aspects of the change-over problem—accounting and financing—our Commission has taken into account the fact that there has been a substantial change in thinking as to proper depreciation practices both on the part of the industry and the regulatory authorities. Accordingly we have tended to require a gradual rather than an abrupt change-over to straight-line depreciation.

Perhaps some of the experience that we have had in connection with refundings and with reorganizations, both formal and informal, may throw some light on an approach which we have found to be feasible and beneficial to the companies, their security holders and the public gen-

erally. Usually when a utility reorganization case is before us, we find that not one but a number of financial and accounting matters require correction. These may include inadequate depreciation reserves, inflationary items that must be eliminated and excessive senior securities that must be scaled down. While there are certain objective standards toward which we aim, we have found as a practical matter that we attain or fall short of our goal depending upon the ingredients with which we have to work in the particular case. The diversity of results reached, with respect to depreciation and debt ratios for example, is due to the difference in practical obstacles from case to case. I may say that with the cooperation of the companies concerned, the application of that method has been most successful. In all such cases, the more important defects have been eliminated and where it has not been feasible to obtain an ideal financial structure immediately, provision has been made for the transition to that goal over a period of years.

In the case of debt financing it is usually customary to provide for a maintenance and depreciation fund in the mortgage indenture. Its purpose is to assure as certainly as possible that the amount of net property securing the mortgage will not decrease and thereby distort the ratios of bonds to net property contemplated in the mortgage. The kind of provision that is necessary in any given situation to provide for adequate maintenance and depreciation is difficult to determine. There has been no unanimity of opinion as to how such a calculation should be made. In the majority of

cases it has been customary to use a percentage of gross revenue as the sum necessary for this purpose in the absence of a more satisfactory basis. Generally, 15 percent of gross revenues is specified as the amount which must be accounted for to the trustee of the mortgage for maintenance and depreciation. Under the increased revenues of the war period this percentage has resulted in a substantial increase in depreciation reserves. I think it should be realized, however, that while these indenture provisions generally serve the purpose for which they are intended, they are not, except as a matter of coincidence, the equivalent of a systematically determined provision for depreciation and maintenance.

It has been our experience that the application of the foregoing policies has materially improved the financial condition of the utility companies concerned. This has been accomplished not only without burden to their security holders and their consumers but with positive benefits to them.

Let me give you a few illustrations from our experience which will indicate some of the specific improvements that have been made with respect to depreciation policy. In connection with a refunding program by a large electric utility system, the depreciation reserve was increased from $10,800,000 or 4.01 percent of its plant account to $23,900,000 or 10.1 percent of total plant. I may also add that in the case of this company the annual accrual for depreciation increased from $1,724,000 in 1936 to $4,491,000 in 1942. In other such cases depreciation reserves were increased from 6.9 percent of total property to 11.12 percent

in one case; from 5.89 percent to 8.77 percent in another; and from 1.35 percent to 11.5 percent in still another case. Numerous other illustrations can be cited to show the extent to which depreciation reserves in the electric utility industry have improved, especially over the past six years. The over-all figures for the private electric utility industry show that depreciation reserves increased from $1,495,000,000 on December 31, 1937 to $2,306,000,000 on December 31, 1942. On the earlier date, such reserves were 10.8 percent of the total plant account and at the end of 1942 that ratio had increased to 15.5 percent. As the Federal Power Commission has pointed out, annual depreciation and amortization charges increased by nearly $100,000,000, or 40 percent, from 1937 to 1942. This represented an increase in the average annual rate of accrual from 1.7 percent of total utility plant in 1937 to 2.2 percent in 1942.

I have referred earlier to the industry's fears that your recommendations would involve unfair retroactive regulation. As I have said, we believe that such expressions of concern are not justified by a fair reading of your report. Nevertheless we do recognize that there are problems with respect to the changeover from retirement to straight-line depreciation accounting both as to the timing of its accomplishment and as to its effects upon investors and consumers. As you have pointed out in your report, it may not be practicable to draft a uniform rule in this regard to cover all cases. I think, however, that it would be advantageous if you were to extend your

analysis of the change-over problem to indicate certain principles that should be followed in various types of situations. In this connection, to cite the experience of our Commission under the Holding Company Act, we have found in financing and reorganization cases that these problems can be resolved by a gradual approach and in a manner that achieves important improvements on a fair and equitable basis with lasting benefits to investors and consumers.

Appendix F

Securities and Exchange Commission,
Philadelphia 3, June 21, 1945.

Re: Minnesota Power & Light Company, American Power & Light Company, File No. 54–101; Minnesota Power & Light Company, American Power & Light Company, File No. 59–75

American Power & Light Company,
Two Rector Street, New York City.

Gentlemen: In response to your letter of April 11, 1945, and in accordance with my previous letter to you dated July 12, 1944 I hereby inform you that the Commission, after consultation with the Solicitor General, agrees that in its opinion the making of the above-entitled filing and the consummation of the transactions contemplated therein do not constitute, and the Commission will not claim that they constitute, an estoppel or waiver by the company of any contentions it has raised in the proceedings in the United States Supreme Court in *American Power & Light Company* v. *Securities and Exchange Commission,* No. 166, 1944 Term.

The above undertaking is without prejudice to the right of the Commission or the Solicitor General, or their representatives, to make any contention, argument or assertion which they would have been in position to make in the absence of the

steps which may be taken by your company or its subsidiaries referred to above. Furthermore, the above undertaking shall not preclude the Commission or the Solicitor General, or their representatives, from presenting by brief or oral argument any facts which may be pertinent to issues before the Court in the pending litigation and we may deem it appropriate to include this letter in any brief which we submit to the Court.

Sincerely yours,

GANSON PURCELL,
Chairman.

U. S. GOVERNMENT PRINTING OFFICE: 1945

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. [redacted] 5

ELECTRIC POWER & LIGHT CORPORATION,
Petitioner,

against

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT AND BRIEF IN SUPPORT THEREOF.

DANIEL JAMES,
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New York 5, N. Y.

JOHN F. MACLANE,
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New York 5, N. Y.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No.....

ELECTRIC POWER & LIGHT CORPORATION,
Petitioner,

against

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Electric Power & Light Corporation (herein sometimes called "Electric") prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the First Circuit to review the decree of that court affirming an order of the Securities and Exchange Commission (herein called the "Commission"). The decree of the Circuit Court of Appeals was entered on March 17, 1944 (R., Vol. IV, pp. 900-901). A petition for rehearing was denied on April 18, 1944 (R., Vol. IV, p. 901).

This petition is based on the same record as the petition of American Power & Light Company (herein called "American") this day filed in this Court to review a like

decree of the Circuit Court of Appeals filed on the same day pursuant to the same decision, the cases having been consolidated for argument and decision in that court.

Opinions Below.

This cause originated by proceeding instituted by the Commission on May 10, 1940, under Section 11(b)(2) of the Public Utility Holding Company Act of 1935, against Electric Bond and Share Company (herein called "Bond and Share") and certain of its subsidiaries including petitioner and American (R., Vol. I, pp. 27-54). After hearings, the Commission on August 22, 1942, issued its findings and opinion (R., Vol. II, pp. 523-649) and order (R., Vol. II, pp. 652-655) directing that the petitioner be dissolved and that it and Bond and Share submit a plan or plans to the Commission for the effectuation of the order. On August 28, 1942, a rehearing was denied (R., Vol. II, pp. 679-680). The opinion of the Commission has thus far been published by it only as SEC Holding Company Act Release No. 3750.

The affirming opinion of the Circuit Court of Appeals (R., Vol. IV, pp. 868-899) is reported *sub nom. American Power & Light Co.* v. *Securities and Exchange Commission*, 141 F. (2d) 606.

Jurisdictional Statement.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code (Act of February 13, 1925, 43 Stat. 938, U. S. C., Title 28, Section 347(a)), made applicable by Section 24(a) of the Public Utility Holding Company Act of 1935 (49 Stat. 803, 834-5, U. S. C., Title 15, Section 79x(a)).

Statute Involved.

The statute involved is the Public Utility Holding Company Act of 1935 (49 Stat. 803, U. S. C., Title 15, Section 79) (herein called the "Act"). The Commission's order was made under Section 11(b)(2) of the Act. The pertinent provisions of the Act are set forth in the Appendix to the accompanying brief.

Summary Statement of the Case.

Petitioner is a holding company as defined in the Act. Its assets consist primarily of securities of an integrated group of five operating utility companies located in the Gulf South area and referred to herein as the "Southern System".[1] Petitioner owns substantially all the common stock of these five operating companies, except in the case of United Gas Corporation, where petitioner owns a majority of the common stock and the entire issue of more than $88,000,000 of second preferred stock. In addition the petitioner owns a large amount of other securities of these companies (Opinion, Appendix B-3, R., Vol. II, p. 660).

Petitioner is itself a statutory subsidiary of Bond and Share since more than 10% of its voting securities are owned by that company. Bond and Share owns .09% of the $7 Preferred Stock of Electric, 18.5% of the $7 Second Preferred Stock and 57.3% of the common stock (R., Vol. II, p. 544). These securities together total 46.8% of the petitioner's outstanding voting power (R., Vol. II, p. 544).

[1] The five operating companies composing the integrated system of Electric covered by its plan filed December 4, 1941, on which the Commission has failed to hold any hearing, are Arkansas Power & Light Company, Louisiana Power & Light Company, Mississippi Power & Light Company, New Orleans Public Service Inc. and United Gas Corporation and its subsidiaries (R., Vol. II, p. 483 and 499-500).

The Commission found that Bond and Share's ownership of common and preferred stock of Electric was 9.14% of Electric's capitalization of $192,189,868 (R., Vol. II, p. 624 and Opinion Appendix F-1, R., Vol. II, p. 666). In addition, the large cumulative dividends in arrears on petitioner's preferred stock (Opinion, R., Vol. II, p. 544) operate to increase further the interest of petitioner's public security holders. Petitioner's debentures are entirely held by the public and its stock is held by approximately 24,000 public stockholders.

During the course of the proceedings, Electric submitted a voluntary plan which would have brought Electric into conformity with Section 11(b) of the Act (R., Vol. II, pp. 472-520, 532). The Commission has not accorded petitioner any opportunity whatsoever to proceed under this plan or be heard in connection therewith (Opinion, R., Vol. II, pp. 636-647).

The Questions Presented and Specification of Errors.

For the purpose of brevity, the questions presented can be stated as whether or not the Circuit Court of Appeals erred in connection with the assigned errors in the following specification of errors which are intended to be urged:

I. The court erred in affirming the order of the Commission which:

(a) adopted the legally inappropriate remedy of dissolving Electric to remedy the alleged defects in the Bond and Share system;

(b) was based on proceedings not in conformance with the mandatory requirements of Sections 11(a) and (b) of the Act;

(c) was not based on findings of fact necessary to support the Commission's conclusions of undue or unnecessary corporate complexity or unfair or inequitable distribution of voting power;

(d) was arbitrary and unreasonable in choosing among several available remedies the one most severely penalizing the public security holders of Electric and its subsidiaries and the consuming public;

(e) was based on proceedings which do not accord Electric its statutory right to a hearing on its plan of reorganization filed under Section 11(e) of the Act; and

(f) was based on conclusions, assumptions, guesses and speculations as to values of property, arrived at without according petitioner an opportunity to present valuation testimony.

II. The court erred in not considering petitioner's contentions as to the following important questions of federal law on the ground that they were not argued before the Commission:

(a) that Section 11(b)(2) of the Act does not as a matter of statutory interpretation authorize the dissolution of corporations as one of the methods of bringing a holding company system into compliance with the section;

(b) that petitioner is legally incapable of complying with the order of dissolution because dissolution can be effectuated only by a vote of stockholders in pursuance of procedure prescribed by state law;

(c) that the order of the Commission is not in accordance with Section 11(b)(2) of the Act in that it fails to prescribe "steps" which petitioner must take to effectuate compliance with the statutory requirements; and

(d) that the order of the Commission is an effort to deprive petitioner of the benefit of the one-year period granted by Section 11(c) of the Act, within which to comply with orders under Section (b).

III. The Circuit Court of Appeals erred in not holding Section 11(b)(2) of the Act, as construed and applied by the Commission, unconstitutional as:

(a) not based upon or involving a valid regulation of interstate commerce or the exercise of any other federal power;

(b) violating the Tenth Amendment through invading the powers reserved to the states;

(c) a delegation of legislative authority without standards of guidance for administrative action;

(d) violating the due process clause of the Fifth Amendment; and

(e) an *ex post facto* law penalizing Electric and its security holders for acts performed before the statute was passed and legal when done.

Reasons Relied on for Allowance of the Writ.

I.

The Circuit Court of Appeals has decided important questions of federal law which have not been, but should be, settled by this Court.

The constitutionality of Section 11(b)(2) of the Act, its construction and the scope of the Commission's power thereunder are all important questions not yet passed upon

by this Court. Public interest and that of public security holders will be greatly aided by an authoritative decision of these questions. Questions concerning the constitutionality of important federal legislation should be resolved by this Court. An important question is raised as to whether or not the Act authorizes dissolution of companies subject to the Act as a means of ending the "continued existence of any company *in the holding company system.*" Similarly, the Commission's interpretation of Section 11(b)(2) of the Act to allow it an unfettered choice of remedies and not to require consideration by it of a plan submitted as provided in the Act raises questions of far reaching significance which should be settled by this Court.

II.

The Circuit Court of Appeals has decided federal questions in a way probably in conflict with applicable decisions of this Court.

The important constitutional questions, including whether or not Section 11(b)(2) of the Act purports to be or is a valid exercise of the commerce or other federal power and whether or not that section of the Act, as applied, deprives petitioner of property without due process of law, are noted in the petition being filed in this Court by American. In the interest of brevity, petitioner refers to the arguments there advanced for the allowance of the writ.

Among other questions on which the opinion of the Circuit Court of Appeals is in conflict with applicable decisions of this Court is the one raised by petitioner's argument based on *Securities and Exchange Commission* v. *Chenery Corporation,* 318 U. S. 80 (1943). That case requires consideration, which the Circuit Court of Appeals failed to give, of petitioner's argument that the detailed

findings of the Commission are at variance with its ultimate conclusions. Failure to consider this argument opens an easy way to defeat this Court's pronouncement that an administrative order must be judged upon the grounds which the record shows were the bases of the administrative action.

III.

The Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The Circuit Court of Appeals placed its refusal to consider certain of petitioner's arguments on an asserted lack of power to consider such questions on the ground that they were not raised before the Commission. Various stipulations and statements were brought to the Court's attention to show that the Commission was fully aware of the petitioner's contentions on these questions and to justify the failure actively to urge and argue such points. Since Section 24(a) of the Act charges the court with the duty to consider whether there were reasonable grounds for failure to raise issues before the Commission, the Circuit Court of Appeals departed from usual judicial proceedings in its failure to give any consideration to whether or not such stipulations and statements constituted reasonable grounds for failing to urge and argue the particular points.

IV.

The Circuit Court of Appeals has sanctioned such a departure by the Commission from the accepted and usual course of administrative proceedings as to call for an exercise of this Court's power of supervision.

The Commission's departure from the accepted and usual course of administrative proceedings arose in connection with its arbitrary choice of remedy and its failure to accord petitioner its statutory right to a hearing on its plan of reorganization.

V.

The decision below adopted an erroneous interpretation of the Act and should be reviewed in order that the Act be interpreted and enforced as intended by Congress.

Erroneous interpretations of the Act involve the power of the Commission to order dissolution, the unfettered choice of remedy accorded the Commission by the court, and the denial of petitioner's statutory right to a hearing on its plan. In addition, the interpretation of Section 11(b)(2) of the Act that allowed consideration of value in connection with the issues of corporate complexity and distribution of voting power, yet deprives petitioner of an opportunity of introducing valuation testimony, is such a paradoxical error that this Court should not allow it to continue in connection with so important a statute as this Act. Instead of correcting this interpretation the Circuit Court of Appeals indulged in a presumption (R., Vol. IV, p. 888; 141 F. (2d) at 619) that such an "egregious blunder" could not have been committed.

VI.

The Circuit Court of Appeals erred in its decree.

WHEREFORE, for the reasons stated above and discussed more fully in the annexed brief, your petitioner prays that a writ of certiorari be issued out of and under the seal of this honorable Court, directed to the United States Circuit Court of Appeals for the First Circuit, to the end that the above cause may be certified to and reviewed and determined by this Court and that the judgment of said Circuit Court of Appeals in the above-entitled cause may be reviewed by this Court, and your petitioner prays for such other and further relief as this Court may deem just and proper.

Respectfully submitted,

DANIEL JAMES,
JOHN F. MACLANE,
FRANK A. REID,
Counsel for Petitioner.

June 16, 1944.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. ———

ELECTRIC POWER & LIGHT CORPORATION,
Petitioner,

against

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

[For index, table of cases, reference to opinions below, jurisdictional statement, statement of the case and specification of errors, we refer to the petition.]

ARGUMENT.

I.

The action by the Circuit Court of Appeals on procedural objections to the order involves important federal questions, a conflict with decisions of this Court, a departure from accepted and usual judicial and administrative procedure, and an erroneous interpretation of the Act.

Section 11(b)(2) of the Act provides that the Commission shall specify the "steps" to be taken in order to ensure

that the "continued existence of any company *in the holding-company system* does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system." It does not provide for elimination or dissolution of companies as such.

The present proceedings were instituted by a "Notice and Order" for hearing issued by the Commission on May 10, 1940, which brought into question the structure of the Bond and Share holding-company system, charging that it was unduly complicated and resulted in unfair and inequitable distribution of voting power among security holders of that system (R., Vol. I, pp. 27-54). By subsequent order, dated June 7, 1940, (R., Vol. I, pp. 65-66) the issue was confined to the single question of whether it is necessary to discontinue the existence of Electric (or American) to remedy these defects in the Bond and Share system.

The remedy adopted of ending corporate existence of a company which is not the one controlling the system to which the proceeding related is a "death sentence" imposed on the wrong party. It is axiomatic that to punish one corporation, owned largely by public security holders, for the sins of another not controlled by it, in a proceeding directed entirely against the holding-company structure of such other corporation, has no foundation in law or justice.

Elimination of Electric's existence in the Bond and Share holding-company system could, of course, be accomplished without injury to innocent public security holders of Electric by simply ordering Electric's divestment from the Bond and Share system.

A point of primary importance to Electric, its public security holders and other holding companies and their

investors arises from the absence of any provision in the Act giving the Commission power to order corporate dissolution. Literally billions of dollars are involved in this question relating to the Commission's power to order dissolution. That Congress intended to give the Commission no such power can be seen from the fact that language directed to the abolition of holding companies and ordering them to "reorganize or dissolve" was struck from the bill (original draft of Wheeler-Rayburn bill, 74th Cong., 1st Sess., S. 1725, Sections 2(c) and 11 and H. R. 5423, Sections 1(c) and 10; the House struck similar provisions from Section 11(b)(2) of S. 2796, 74th Cong., 1st Sess., the bill which became law). The Commission cannot do by construction what Congress declined to do by enactment.

Pennsylvania Railroad Company v. *International Coal Mining Company*, 230 U. S. 184, 198 (1913);

Carey v. *Donohue, Trustee in Bankruptcy of Humphreys*, 240 U. S. 430, 437 (1916).

The Commission's lack of power to order dissolution was one of four questions not passed upon by the Circuit Court of Appeals. Other arguments which the court declined to consider were: (1) that dissolution could only be effectuated by stockholders pursuant to state law; (2) that the order failed to meet the statutory requirement that it prescribe "steps" to effectuate compliance with the Act; and (3) that by ordering dissolution at a time when other matters were pending before the Commission which required hearings and determination by the Commission before dissolution could be effected (Opinion, R., Vol. II, pp. 648-649), the Commission deprived Electric of the one-year period granted by Section 11(c) within which to com-

ply with the order. The court specifically placed its failure to consider such questions on an asserted lack of power to consider them, due to the fact that they were not raised before the Commission. Petitioner contends that these questions were raised and brought to the attention of the Commission. This is not the place to argue this in full. However, the stipulation reserving the right to raise all legal issues (R., Vol. II, pp. 522 and 528) which the Circuit Court of Appeals viewed as not constituting a "waiver," (R., Vol. IV, p. 876; 141 F. (2d) at 616) should have been viewed in the light of Section 24(a) of the Act allowing the court to review issues not raised before the Commission where there "were reasonable grounds for failure so to do." The court's assertion of a total lack of power to consider such issues was thus unwarranted. The importance of a determination of such issues which cut to the heart of the application of the Act need not be labored.

The Commission departed from the accepted and usual course of administrative proceedings in failing to accord petitioner a hearing on its Section 11(e) plan. The Commission thus ignored both the scheme and the mandate of the Act. The scheme of the Act for achieving its main objectives of geographical integration and simplification of corporate structure by voluntary action is apparent from any examination of the Act. Section 11(e) of the Act provides that a holding company may at any time submit a plan and requires that the Commission "after notice and opportunity for hearing * * * *shall* make an order." The plan proposed by Electric (R., Vol. II, pp. 487-518) provided for integration through coordinated control of Electric's interconnected Southern System. It provided for corporate simplification through the issuance of a single class of voting stock.

The Commission's statement that it would "supervise all details of the effectuation of the order" (Opinion, R., Vol. II, p. 648) indicates the Commission's intent that what is in effect an involuntary reorganization may be forced on your petitioner without any consideration or opportunity for hearing on its proposed plan.

II.

The Commission's decision was based upon conclusions unsupported by findings of fact. Its affirmance was, therefore, contrary to decisions of this Court and not in accordance with accepted and usual standards applicable to administrative proceedings.

This Court held in *Securities and Exchange Commission* v. *Chenery Corporation*, 318 U. S. 80 (1943), that administrative orders must be judged upon the grounds on which the administrative body purported to act. The Circuit Court of Appeals failed to apply this test and dealt only with whether or not the ultimate conclusions *could* be supported by the record. *Actually* the Commission placed its conclusions as to unfair and inequitable distribution of voting power on particular findings made by it. This is shown by the statement that its conclusion was arrived at "on the basis of the foregoing figures" (Opinion, R., Vol. II, p. 624). The Commission compared Electric's investments in its subsidiaries with the total capitalization of such subsidiaries (Opinion, R., Vol. II, p. 622).[2] The Commission's own figures left Electric with 39.21% of the total capital-

[2] Petitioner contended that it was fallacious to include bonds and other debts of operating subsidiaries in a comparison made for the purpose of judging distribution of voting power. Excluding such securities, which ordinarily carry no vote, Electric has 65.02% of the equity.

ization (Opinion, R., Vol. II, p. 622). The Commission adjusted this figure to a lower one by assumed deductions for "write-ups" and inadequate depreciation reserves (Opinion, R., Vol. II, pp. 622-623). Since these assumptions were qualified so as not to be fact findings, the 39.21% remains as the fact finding against which to test the ultimate conclusion of unfair and inequitable distribution of voting power. It is manifest that, as a matter of law, voting control by the owner of practically 40% of the total investment, even including debt, is not unfair or inequitable.

Furthermore, the Commission's reasoning is entirely unsupportable in that it draws overall conclusions based on an algebraic addition of alleged plus and minus investments in various subsidiaries, holding in effect that since Electric's common stocks in one subsidiary are "under water," the amount of the deficiency should be deducted from its investment in other subsidiaries. For example, no one has questioned that Electric has an actual investment in the order of $90,000,000 in United Gas Corporation representing substantially complete ownership of this very large equity. Surely there can be no reason why Electric should be required to divest itself of that equity because it is said to have a minus investment in another company such as Utah Power & Light Company.

Space does not permit presentation here of a similar demonstration with reference to the ultimate conclusion in regard to undue and unnecessary corporate complexity. It is sufficient to note that this conclusion was based primarily on the same figures and comparisons used by the Commission as the basis for its conclusion as to voting power (Opinion, R., Vol. II, pp. 624-625). It thus follows that here again the facts found fail to support the ultimate conclusion and thus affirmance of such conclusion based upon

the grounds assigned by the Commission is in conflict with the decision of this Court in the *Chenery* case.

Many of the Commission's rulings, particularly those as to the distribution of voting power, were made upon assumptions, guesses and speculations as to value. Without proper findings as to value, there is nothing to support the opinion. The opinion shows (Opinion, Appendix F-1, Col. 2, R., Vol. II, p. 666) the underlying book value of Electric's investments in its subsidiaries to be over $256,000,000 and Bond and Share's direct investments in such subsidiaries to be over $58,000,000. This total of more than $314,000,000 represents 48% of the total capitalization of these operating subsidiaries. Any finding at variance with these book values is unwarranted since the Commission refused to consider valuation evidence (R., Vol. I, pp. 234-262). For further discussion of the errors involved in excluding valuation evidence, see American's brief, Point II(b).

III.

The affirmance of the Commission's arbitrary choice of remedy was contrary to applicable decisions of this Court and was an approval of administrative action not in accordance with accepted and usual administrative procedure.

A further and fundamental vice in the Commission's order was the choice of the drastic remedy of dissolution. Where there is a choice of remedies and where the rights of innocent third persons, including the investing and consuming public, will be affected by the application of the remedy selected, that remedy should be chosen which will do least injury to public interests and yet give effect to the

statutory mandate. Moreover, where there is in addition a selection to be made as to the persons against whom the penalty of the remedy will operate, the penalty should be imposed on the "real wrong-doers." In such a situation, which is the one here presented, the selection of a remedy which penalized innocent third persons and the investing and consuming public was arbitrary, unreasonable and in conflict with decisions of this Court.

Standard Oil Co. v. *United States,* 221 U. S. 1, 78, 81 (1911);
United States v. *American Tobacco Co.,* 221 U. S. 106, 184-5, 187-8 (1911);
United States v. *United States Steel Corporation,* 251 U. S. 417, 457 (1920).

The Commission should have followed this settled judicial approach in considering other available remedies before entering the drastic dissolution order against Electric. Just as in the *American Tobacco* case, this Court directed that, before the lower court should consider more drastic action, hearings should be held on methods to end the combination and create a condition in harmony with the law, so in this case such hearings on methods to bring about simplification should have been held. By parity of reasoning (and assuming the validity of the statute, the authority of the Commission to order dissolution, and the existence of voting inequities and complexity of structure), the drastic remedy of dissolution was available to the Commission only if neither the Commission by order, nor the parties by agreed plan, could reach a result simplifying structure and eliminating voting inequities.

The Commission's only justification for its wide departure from the accepted and usual course of proceedings is

that, while it admitted that other remedies were available, the present order was capable of prompt execution and avoided further hearings and administrative difficulties (Opinion, R., Vol. II, pp. 636, 640, 646-647). However, this Court has held that "the advantages of a simple rule must be balanced against the importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment." *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U. S. 177, 198 (1941). The above authorities sufficiently answer this argument of convenience, as well as the Commission's argument (Opinion, R., Vol. II, pp. 638-639) that dissolution was *necessary* because in the Commission's opinion it was an *available* remedy.

IV.

The constitutionality of Section 11(b)(2) of the Act as construed and applied by the Commission is a question of federal law of utmost importance which has not been, but should be, settled by this Court.

This Court by granting writs of certiorari in *North American Company* v. *Securities and Exchange Commission,* 318 U. S. 750 (1943), *Engineers Public Service Co.* v. *Securities and Exchange Commission,* October Term, 1943, No. 635 (June 5, 1944) and *Otis & Co.* v. *Securities and Exchange Commission,* October Term, 1943, No. 993 (June 12, 1944), has already indicated its desire to review the constitutionality of parts of Section 11 of the Act and the validity of action taken by the Commission under this important section. Determination of the constitutional questions here involved is of no less importance. Of the sixteen largest holding-company systems registered under the Act, having

total assets of $14,729,000,000, nearly all are involved in proceedings relating to Section 11(b)(2) (SEC Annual Report for 1943, pp. 25-38).[3] The need for an authoritative decision by this Court with reference to the constitutionality of this major legislation affecting such vast assets is of vital interest both to investors and the consuming public.

If this section of the Act is overthrown or its application limited, such result should be brought about before intervening rights accrue making it impossible to restore corporate *status quo*. On the other hand, the upholding of Section 11(b)(2) by this Court would undoubtedly expedite other proceedings pending before the Commission and the courts.

The particular constitutional issues raised by the present petition, involving the scope of federal power, delegation of legislative authority and violations of the due process clause, are argued in the brief being filed by American. The constitutional principles presented therein apply equally to Electric. In the interest of brevity, Electric adopts in support of its position on the constitutional issues the statements and arguments contained in American's petition and brief.

---

[3] The major holding-company systems listed in the Commission's report as involved in proceedings relating to Section 11(b)(2) are the systems of: Electric Bond and Share Company, The North American Company, The Commonwealth & Southern Corporation, Cities Service Company, Associated Gas and Electric Company, Standard Power and Light Corporation and Standard Gas and Electric Company, Columbia Gas & Electric Corporation, Niagara Hudson Power Corporation, International Hydro-Electric System, The Middle West Corporation, The United Light and Power Company, American Water Works and Electric Company, Inc., Northern States Power Company and The United Corporation.

Conclusion.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DANIEL JAMES,
JOHN F. MACLANE,
FRANK A. REID,
Counsel for Petitioner.

APPENDIX

Excerpts from Public Utility Holding Company Act of 1935 (49 Stat. 803, U. S. C., Title 15, Section 79):

"Section 11. ***Simplification of holding company systems—***

"(a) ***Examination by Commission with view to simplification.***

"It shall be the duty of the Commission to examine the corporate structure of every registered holding company and subsidiary company thereof, the relationships among the companies in the holding-company system of every such company and the character of the interests thereof and the properties owned or controlled thereby to determine the extent to which the corporate structure of such holding-company system and the companies therein may be simplified, unnecessary complexities therein eliminated, voting power fairly and equitably distributed among the holders of securities thereof, and the properties and business thereof confined to those necessary or appropriate to the operations of an integrated public-utility system.

"(b) ***Limitations on operations of holding company systems.***

"It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

* * *

"(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute

voting power among security holders, of such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company.

• • •

"The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist. Any order made under this subsection shall be subject to judicial review as provided in Section 24 of this chapter.

"(c) ***Time for compliance with order limiting operations.***

"Any order under subsection (b) shall be complied with within one year from the date of such order; but the Commission shall, upon a showing (made before or after the entry of such order) that the applicant has been or will be unable in the exercise of due diligence to comply with such order within such time, extend such time for an additional period not exceeding one year if it finds such extension necessary or appropriate in the public interest or for the protection of investors or consumers.

• • •

"(e) ***Submission by company of plan for simplification; court enforcement of order of approval; appointment of trustee.***

"In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered hold-

ing company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan.

* * *

"Section 24. *Court Review of Orders.*

"(a) Any person or party aggrieved by an order issued by the Commission under this chapter may obtain a review of such order in the circuit court of appeals of the United States * * *. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. * * *"

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 5

ELECTRIC POWER & LIGHT CORPORATION,

Petitioner,

against

SECURITIES AND EXCHANGE COMMISSION.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR PETITIONER ELECTRIC POWER & LIGHT CORPORATION.

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Of Counsel.

October 15, 1945.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

ELECTRIC POWER & LIGHT CORPORATION, Petitioner, *against* SECURITIES AND EXCHANGE COMMISSION.	No. 7

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR PETITIONER ELECTRIC POWER & LIGHT CORPORATION.

Introduction.

This case is a companion case to *American Power and Light Company* v. *Securities and Exchange Commission*, No. 6. Both cases are the result of a single proceeding instituted by the Securities and Exchange Commission under Section 11(b)(2) of the Act, culminating in orders of dissolution which were upheld by the United States Circuit Court of Appeals for the First Circuit.

It is not the purpose of this petitioner, Electric Power and Light Corporation (hereinafter called "Electric"), to burden the Court with a repetition of argument already made in the American brief. The order of the Commission providing for the dissolution of Electric and that providing for the dissolution of American were entered on a single

opinion, on a consolidated record involving both petitioners, the grounds given by the opinion and orders of the Commission for the dissolution of each being the same. The Commission's orders were similarly treated in a single opinion by the Circuit Court of Appeals and both cases are now before this Court on a common record and have been consolidated for argument.

The arguments of American are, *mutatis mutandis*, applicable to Electric's case before this Court, and Electric urges those arguments on its own behalf. In principle the facts of each case are parallel for the purposes of review by this Court. If Section 11 of the Act is unconstitutional, or if Section 11 does not authorize the dissolution of holding companies in any situation, or if the action of the Commission in ordering the dissolution of American is void for any other reason, the action of the Commission in ordering the dissolution of Electric will also be void.

In this brief, however, Electric presents a separate argument upon which it believes that its case can and should be decided and which removes any necessity for going into issues of constitutional law, or of whether the Commission has power to dissolve corporations under Section 11 of the Act.

This separate argument on behalf of Electric falls into two parts. The first part is based upon the failure of the Commission to discharge its statutory duties under Section 11(a), Section 11(b)(1), and Section 11(e) of the Act. The second part of Electric's argument is directed to the errors of the Commission in dealing with Electric under Section 11(b)(2). The factual presentation of Electric's case will consequently be confined to the facts which bear upon these two arguments.

This is not to state that the arguments here made on behalf of Electric are not, *mutatis mutandis*, also applicable to American. It has been petitioners' effort rather to facilitate the decision of this Court with respect to both cases by refraining from duplicating complicated statements of fact and recitations of prior proceedings that raise precisely parallel legal problems. Only in briefly describing Electric itself and in discussing the particular errors of the Commission in dealing with the particular facts pertaining to Electric under Section 11(b)(2) will it be necessary to depart to some extent from that objective.

Opinions Below.

The opinion of the United States Circuit Court of Appeals for the First Circuit (R., Vol. IV, 869-899) is reported in 141 F. (2d) 606. The opinion of the Commission (R., Vol. II, 523-649) is reported in 11 SEC 1146.

Jurisdiction.

The decree of the United States Circuit Court of Appeals for the First Circuit was entered on March 17, 1944 (R., Vol. IV, 900) and Electric's petition for rehearing was denied by order of that court on April 18, 1944 (R., Vol. IV, 901).

The jurisdiction of this Court is invoked by petition for writ of certiorari to the United States Circuit Court of Appeals for the First Circuit under Section 240(a) of the Judicial Code (Act of February 13, 1925, 43 Stat. 938, U. S. C., Title 28, Section 347(a)), made applicable by Section 24(a) of the Public Utility Holding Company Act of 1935 (49 Stat. 803, 834-5, U. S. C., Title 15, Section 79x(a)). This Court granted Electric's petition for a writ of certiorari on May 28, 1945 (R., Vol. IV, 901).

Statute Involved.

The statute involved is the Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 U. S. C., Section 79), copies of which are being submitted to the Court by American. Electric's argument revolves primarily around Section 11(a), Section 11(b)(1), Section 11(b)(2), and Section 11(e), which are set forth in Appendix A to this brief.

Questions Presented.

The questions presented in this brief are:

First: Whether the Commission can dissolve Electric under Section 11(b)(2) of the Act without any regard whatever to the purposes and requirements of Section 11(a), Section 11(b)(1), and Section 11(e); and

Second: Whether the findings of the Commission support the dissolution of Electric under Section 11(b)(2).

Statement.

Electric was organized in 1925 under the laws of the State of Maine and is a registered public utility holding company under the Act. Its subsidiaries include its southern electric system, consisting of Arkansas Power & Light Company, Louisiana Power & Light Company, Mississippi Power & Light Company, and New Orleans Public Service, Inc.* (R., Vol. II, 545). Electric also has as subsidiaries United Gas Corporation and Dallas Railway & Terminal Company, and at the time of the issuance of the dissolution order it included among its subsidiaries Utah Power & Light

* This southern electric system is sometimes referred to in the industry as the ALMNO system, from the initials of the companies comprising it.

Company,* Idaho Power Company,† and Dallas Power & Light Company.‡

Electric, in addition to being a registered public utility holding company under the Act in its own right and in addition to being preponderantly owned by the public, is by statutory definition a subsidiary of Electric Bond and Share Company (herein called Bond and Share), and, as such, one of the five main sub-holding companies in the Bond and Share holding company system. It is to Bond and Share and to the Bond and Share system that this proceeding has been directed throughout.

The subsidaries of Electric have total assets carried at $772,751,730 (Appendix F-2 to SEC Opinion, R., Vol. II, 667) and the consolidated capitalization of Electric and its subsidiaries as of December 31, 1941, was as follows:

Long-Term Debt:	
Electric	$ 30,380,000
Subsidiaries	260,441,615
Preferred Stocks:	
Electric	84,575,467
Subsidiaries	117,405,300
Minority Interest#	2,534,194
Undeclared Cumulative Dividends on Preferred Stock of Subsidiaries held by Public	17,803,228
Common Stock: Electric	70,468,672
Earned Surplus	33,987,475
	$617,595,951

(R., Vol. II, 546-547).

* To be disposed of in the reorganization of Utah Power and Light Company now pending before the Commission. *Matter of Electric Power & Light Corporation and Utah Power & Light Company*, SEC Holding Company Act Release No. 5681 (March 24, 1945).

† Sold by Electric since the issuance of the dissolution order. *Matter of Idaho Power Company and Electric Power & Light Corporation*, SEC Holding Company Act Release No. 4458 (July 29, 1943); Same case, SEC Holding Company Act Release No. 4527 (August 31, 1943).

‡ To be sold pursuant to a proceeding now pending before the Commission. *Matter of American Power & Light Company and Electric Power & Light Corporation*, SEC Holding Company Act Release No. 6021 (August 31, 1945).

I.e., minority interest in common stocks of subsidiaries of Electric.

Electric owned from 61% to 95% of the voting power of its respective utility subsidiaries (R., Vol. II, 548). The aggregate par, stated or assigned value of all securities of its subsidiaries owned by Electric as of December 31, 1941, was $199,802,994 and their book value on the books of the issuers, including surplus and preferred dividend arrearages, was $256,415,384. Electric carried these securities in its investment account at $184,409,070 (R., Vol. II, 547).

At December 31, 1941, the subsidiaries of Electric had securities amounting to $339,188,243 outstanding in the hands of the public (Appendix F-2 to SEC Opinion, R., Vol. II, 667).

The capitalization of Electric itself at December 31, 1941, was as follows:

Type of Security	Amount Outstanding	Principal Amount or Stated Value
Gold Debentures, 5% Series, Due 2030	$30,380,000	$ 30,380,000
$7 Preferred Stock, Cumulative, No Par	515,135 shs.	
$6 Preferred Stock, Cumulative, No Par	255,430⅔ shs.	155,044,139
Second Preferred Stock, Series A, ($7) Cumulative, No Par	75,189 shs.	
Common Stock, No Par	3,453,189 shs.	
Earned Surplus		6,868,838
Total Capitalization and Surplus		$192,292,977
Unpaid Cumulative Dividends in Arrears June 30, 1942		$ 53,205,168

(R., Vol. II, 543-544).

The holdings of Bond and Share in voting securities of Electric, consisting principally of common stock, represent 46.8% of the total voting power of all the securities of Electric and have a stated or liquidating value of $17,558,108, or 9.14% of Electric's total capitalization, including debt securities and surplus (R., Vol. II, 544). The remaining securities are widely held by the public. There

are 24,000 stockholders of Electric (Tr., p. 5160), and thousands more have invested in its debentures.

This holding company, Electric, has been ordered dissolved by the Commission in a proceeding the issue of which was narrowly defined by the Commission on June 7, 1940, as:

> "* * * the *sole* issue of whether it is necessary to discontinue the existence of American Power & Light Company, *Electric Power & Light Corporation*, National Power & Light Company, and American & Foreign Power Company, Inc., or any of them, in order to ensure that the structure of the holding company system of Electric Bond and Share Company shall not be unduly or unnecessarily complicated and that voting power shall not be unfairly or inequitably distributed among the security holders in that system"* (R., Vol. I, 64-5).

Any and all issues relating to Electric itself and any and all issues relating to any provision of the Act other than Section 11(b)(2) were thereby eliminated from the proceeding by the Commission itself. The issue was thus so framed as to make it appear either that nothing could be done with respect to the Bond and Share system pursuant to Section 11 or that Electric must be dissolved. No alternatives were to be considered.

Additional facts bearing upon Electric's argument will, in order to avoid a duplication, be set forth in connection with the relevant portions of the argument. The salient facts to be brought out here are:

First: That Electric owns an inter-connected southern electric system which it has sought to preserve as an "integrated public-utility system" (Section 2(a)(29) of the Act) throughout this proceeding; and

---

* Emphasis in quotations added, unless otherwise noted.

Second: That the vast preponderance of the ownership of Electric is in the hands of the public, whose rights are clearly recognized and sought to be protected by the Act; and

Third: That Electric has been ordered to dissolve, not for any sins of its own and certainly not for any sins committed by it as the representative of its more than 24,000 public security holders, but solely because of its alleged effect upon the structure of and the distribution of voting power in the Bond and Share system.

Specification of Errors.

Electric relies on and urges all the errors assigned in its petition for a writ of certiorari (pp. 4-6). However, only those matters set forth in the Questions Presented will be argued in this brief on behalf of Electric, for the reasons set forth above in the Introduction.

SUMMARY OF ARGUMENT

A.

Section 11 of the Act contemplates (1) that existing holding company systems shall be geographically integrated and (2) that existing holding company systems shall not remain unduly or unnecessarily complicated in structure nor retain unfair or inequitable distribution of voting power. The Act imposes upon the Commission the duty of examining *each* and *every* registered holding company and of bringing them into accord with *both* statutory objectives, so far as is possible. The action of the Commission in ordering the dissolution of Electric, even assuming the Commission's factual assertions to be correct, deviates from this statutory duty in the following particulars:

(1) Up to the third degree, holding companies and holding company systems are entitled to live, so far as is possible. Section 2(a)(9) defines a holding company system as *any* holding company, together with its subsidiaries. Electric's statutory rights as the parent company of a holding company system and the Commission's statutory duties with respect thereto are the same as in the case of the Bond and Share system.

The present proceeding ignored the Electric system from start to finish. The rights of the Electric system under Section 11, and the Commission's duties with respect thereto, cannot be disposed of in the absence of a hearing and findings directed to the Electric system.

(2) Neither the Notice of and Order for Hearing in this proceeding under Section 11(b)(2), nor the Findings and Opinion herein reflect any determination by the Commission of the extent to which the corporate structure of Electric may be simplified or of the extent to which the system of either Electric or of Bond and Share may be integrated. The Commission is entirely derelict in the performance of its duties under Sections 11(a), 11(b)(1) and 11(e) and under Section 11(b)(2) with respect to Electric.

(3) Simplification pursuant to Section 11(b)(2) may proceed independently of integration under Section 11(b)(1). *Cf. Commonwealth & Southern Corporation* v. *Securities and Exchange Commission,* 134 F. (2d) 747 (C. C. A. 3rd, 1943.) But simplification cannot proceed inconsistently and in conflict with the requirements of Section 11(b)(1). Simplification to the point of dissolving the head company of a great regional system runs afoul of the coordinate statutory requirement of integration under Section 11(b)(1).

Wiping out the five major subsidiaries of Bond and Share has clearly no relation to the integration require-

ments of Section 11(b)(1). Bond and Share will either be left with statutory "control" of an impossibly unintegrated scattering of utility properties, or neither such "control" nor the possibility of integration of existing holding company systems will exist. On the other hand, in view of the fact that Section 11 contemplates that integration shall be accomplished as far as possible through the medium of existing holding company systems, Electric and its southern system stand squarely within the purview of Section 11.

This is not to urge that Section 11(b)(1) proceedings must precede proceedings under Section 11(b)(2), or that Section 11(b)(2) proceedings may not be had independently of integration. Electric's argument is limited to the fact that Electric itself is the only visible means of integrating its southern system as required by the statute, and consequently cannot be dissolved in the name of simplification without a finding by the Commission that Electric is not a proper vehicle for such integration. The full purpose of Section 11 cannot be fulfilled by a "simplification" which makes integration impossible. The Commission must either utilize other means of simplifying Bond and Share with a view to accomplishing the integration of Electric, or it must find that Electric is not a proper subject for integration. As the Commission has done neither, its order dissolving Electric must fall.

(4) Section 11(e) accords Electric the privilege of filing a plan for bringing itself into conformity with Section 11(b) and gives Electric the *right* to a hearing on that plan. Electric filed a plan pursuant to this section in a bona fide attempt to bring it and its system within the spirit and provisions of Section 11 of the Act, contemplating both the simplification and the integration of its system. The Commission has not given Electric its statutory hearing with respect to this plan but has proceeded instead with the

alleged simplification of the Bond and Share system without any regard whatever to the rights of Electric.

B.

The findings of the Commission in this proceeding cannot support the action of the Commission in ordering the dissolution of Electric under Section 11(b)(2).

Stripped of verbiage and irrelevant corporate statistics, the so-called "Findings" and Opinion of the Commission show on their face that the sole ground for the dissolution of Electric is the claim that it is a "pyramiding device" in the Bond and Share system. The order is obviously not based upon the effect of complexity or unfair distribution of voting power on the Electric system. The order is based solely on the charge that complexity and unfair distribution of voting power result from the "pyramid" of the operating utilities owned by Electric which in turn is "controlled" by Bond and Share within the meaning of the Act.

Substantially all holding company systems subject to the Act are "pyramids" within the rationale of the Commission. Yet the only case in which Congress proscribed holding company systems *for that reason alone* is the case of third-degree holding companies. Even in that case, the remedy is not dissolution but the requirement that the offending holding company "shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company." (Section 11(b)(2)).

The mere fact that Electric is an intermediate holding company is insufficient by itself to justify the dissolution of Electric. No other findings of the Commission support its order. In fact the so-called "Findings" of the Commission consist for the most part of assumptions and guesses, which we shall demonstrate to be glaringly erroneous. The dissolution order must consequently fall.

ARGUMENT

POINT I

THE COMMISSION CANNOT PROCEED TO DISSOLVE ELECTRIC UNDER SECTION 11(b)(2) IN COMPLETE DISREGARD OF THE COORDINATE REQUIREMENTS OF SECTION 11(a), SECTION 11(b)(1) AND SECTION 11(e).

To hold that the broad powers granted to the Commission by Section 11 of the Act are valid, and include the power to dissolve holding companies subject to the Act in appropriate cases, does not dispose of Electric's case. It must still be determined whether the dissolution of Electric squares with the standards and purposes of the Act as a whole. Whatever the power granted to the Commission, that power was not granted as an end in itself, but as a means of accomplishing the duties enjoined upon the Commission by Congress.

Virtually all the provisions of the Act other than Section 11 deal with future events, and are concerned with the registration and regulation of public utility holding companies in order to prevent a repetition of the abuses disclosed by various investigations, beginning as far back as 1928, and enumerated in Section 1 of the Act. Section 11, on the other hand, imposes upon the Commission the task of integrating existing holding companies and simplifying their corporate structures in order to bring existing systems within regulable compass.

Section 11(a) provides:

> "It shall be the duty of the Commission to examine the corporate structure of *every* registered holding company and subsidiary company thereof, the relationships among the companies in the holding-

company system of *every* such company and the character of the interests thereof and the properties owned or controlled thereby *to determine the extent to which* the corporate structure of such holding-company system and the companies therein may be simplified, unnecessary complexities therein eliminated, voting power fairly and equitably distributed among the holders of securities thereof, and the properties and business thereof confined to those necessary or appropriate to the operations of an integrated public-utility system."

The statute enjoins upon the Commission the *duty*, as soon as practicable after January 1, 1938, to require that:

> "*each* registered holding company, and *each* subsidiary company thereof, shall take such action as the Commission shall find necessary *to limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system*, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system * * *" (Section 11(b)(1)).

That statute also requires that, as soon as practicable after January 1, 1938:

> "*each* registered holding company, and *each* subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. * * *" (Section 11(b)(2)).

Chairman James M. Landis on September 28, 1935, summarized the purport of these Sections of the Act as follows:

> "The Act represents a solemn judgment by the Congress that the holding company as a financial and an operating device tends to be destructive of the better values in our civilization, *if the system is permitted to expand beyond the natural boundaries established by economic and geographic limitations.* These boundaries Congress has not specifically defined, nor could it do so, but it has left to our Commission this standard to be applied in the light of continuing and concrete study. *Furthermore, it has given us two years, at the end of which we are to have a plan, to bring about this economic and geographic integration together with the simplification of the complicated financial set-ups* that in so many cases obscure the right of holders of stocks and bonds." (SEC Holding Company Act Release No. 3.)

An examination of the three quotations set forth above from Sections 11(a) and 11(b) of the Act makes it clear that, if the Commission under Section 11 has the vast power of corporate life and death which it claims and which we are assuming *arguendo* that it has, the duties of of the Commission under Section 11 are commensurate with those vast powers. The Commission must make a responsible determination with respect to the extent to which *each* public utility holding company system may be integrated and its corporate structure simplified in order that it shall conform to the Act. The only short-cut to the attainment of the statutory objective is the flat prohibition in Section 11(b)(2) against holding companies of the third degree.

The dual objectives of integration (Section 11(b)(1)) and simplification (Section 11(b)(2)) are of equal importance, and to a large extent interrelated.

As stated by the Commission itself:

> "The two classes of proceedings are interrelated, in that action taken to comply with the geographical standards may also be a step toward achieving corporate simplification, and steps taken in the direction of corporate simplification may serve to eliminate substantial problems which would otherwise require determination in proceedings under Section 11(b)(1)" (*Seventh Annual Report of the S. E. C.*, Fiscal Year Ended June 30, 1941, p. 73).

Indeed, the Commission has expressly recognized the interrelation of geographical integration and corporate simplification with respect to this very proceeding (*infra*, p. 21).

The Impact of Section 11 upon Bond and Share and upon Electric

The Bond and Share system is described by the Commission as "a pyramid-like structure of which Bond and Share itself constitutes the apex, 5 subholding companies create an intermediate tier, and approximately 237 direct and indirect subsidiaries of the latter form the base." (R., Vol. II, 535).

Electric is one of the five major holding subholding companies in the Bond and Share system, each of which is in turn itself the parent company of a holding company system. As of December 31, 1941, the utility subsidiaries of Electric served with electricity approximately 104 communities having a population of 2,500 or over, and served some 98 such communities with gas. These communities, located in Arkansas, Colorado, Idaho, Louisiana, Mississippi, Nevada, Oregon, Texas, Utah, Wyoming and Mexico had a total population of approximately 2,808,244 (R., Vol. II, 548).

Electric is the holding company of one of the most important regional holding company systems in the United

States. Electric's southern system of electrical properties consists of a group of inter-connected electric utilities grid-ironing a large part of Arkansas, Louisiana and western Mississippi.

It is apparent that the application of Section 11 to Electric calls for the fullest discharge of the Commission's statutory functions. The Section was enacted to deal with just such a ramified collection of holding company systems as that of Bond and Share and with just such a holding company system as that of Electric.

Electric's Rights as a Holding Company System are Recognized by the Statute and Must be Recognized by the Commission

The fallacy of the present proceeding lies in the failure of the Commission to recognize any rights on the part of Electric to continue to exist as the parent company of a holding company system owning its own integrated operating properties, to recognize any rights on the part of the public security holders of Electric, or to recognize the duties of the Commission with respect to Electric's system as such.

Section 2(a)(9) defines a holding company system as *any* holding company, together with its subsidiaries. Up to the third degree, *all* holding companies and holding company systems are entitled to live in so far as they can be geographically integrated and in so far as their corporate structure can be simplified in accordance with Section 11. Electric's statutory rights as the parent company of a holding company system are precisely the same as those of Bond and Share. Yet the instant proceeding wholly disregards the Electric system, and, indeed, destroys it without a hearing.

It is perhaps for this reason that the Findings and Opinion attempt to attribute no functions or even separate

identity to Electric, in the hope that the Commission will thereby obscure the fact that it has side-stepped its statutory duties with respect to the Electric system.

According to the Commission itself, the securities of Electric owned by Bond and Share represent less than 10% of Electric's capitalization (R., Vol. II, 544). The remaining 90%, or roughly $175,000,000 out of a total capitalization of approximately $192,000,000, is represented by securities held by the public.

There are at present 24,000 stockholders of Electric (Tr., p. 5160) and thousands more have invested in its debentures. When a utility system of such magnitude, so preponderantly owned by the public, is affected by a statute the purpose of which is stated in its text no less than 68 times as the protection of the "public interest" and of "investors or consumers," it is preposterous to contend that such a system has no independent standing under the Act.

Disparaging the functions of Electric and pointing out that Bond and Share's statutory control enabled it to elect the board and officers of Electric, which take the Commission many pages to discuss, are both beside the point. Section 11 was not enacted to mete out rewards and punishments for past performance. Given perfect past performance, there would have been no Act. The statute assumes that the growth of holding companies in the past has left something to be desired, and has specified the remedy: integration and simplification of *existing* holding company systems, of which Electric is one.

The Commission has not Discharged the Duties Enjoined upon it by the Act

Section 11 contains detailed directions defining the responsibilities of the Commission, together with a time schedule.

The statute was enacted in 1935. Section 11(a) provides that it shall be the duty of the Commission to examine the corporate structure of *every* registered holding company and subsidiary company thereof to determine the *extent to which* the corporate structure of its holding company system and the companies therein may be simplified and geographically integrated. As stated by Chairman Landis (*supra*, p. 14), this section contemplates that within two years the Commission shall have a plan to bring about economic and geographic integration of holding company systems together with corporate simplification.

Section 11(b) provides that as soon as practicable after January 1, 1938, roughly two years after the statute became effective, the Commission, after notice and opportunity for hearing, shall proceed to bring about this economic and geographic integration and the corporate simplification of existing holding company systems, presumably in accordance with some purpose arrived at under Section 11(a).

While Section 11(e) permits any registered holding company or subsidiary thereof to submit a plan for compliance with Section 11(b) at *any* time after January 1, 1936, the great majority of companies refrained from taking any action under the statute until its constitutionality was decided by this Court on March 28, 1938, in *Electric Bond and Share Company* v. *Securities and Exchange Commission*, 303 U. S. 419. In that case, however, while the Court upheld the registration provisions of the Act, it did not pass upon the constitutionality of Section 11.

Thereafter, in response to a letter from the Chairman of the Commission, dated August 3, 1938, Electric filed a preliminary statement relating to the integration of its system under Section 11(b) in November of 1938. The Commission's views on Section 11(b) as of that time are summarized in its Fifth Annual Report for the fiscal year ended June 30, 1939:

"Section 11(b) of the Public Utility Holding Company Act of 1935 imposes upon the Commission certain duties with regard to the integration and corporate simplification of public utility holding company systems. The Commission is directed to require every registered holding company to take such action as the Commission shall find necessary to limit the operations of its system to those of a single integrated public utility system and to such other businesses as are reasonably, incidentally, or economically necessary or appropriate to the operation thereof. However, the Commission must permit one holding company to control more than one integrated system if it shall be proved that each such additional system cannot be operated independently without the loss of substantial economies, that all of such additional systems are located in one State or in adjoining States or in a contiguous foreign country, and that the continued combination of such systems under the control of the one holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation.

"The Commission must also cause the companies under its jurisdiction to bring about a simplification of holding company structures so as to eliminate unnecessary complications or unfair distributions of voting power. This must include elimination of holding companies beyond the second degree.

"Instead of waiting for the Commission to bring action, registered holding companies or subsidiaries may invoke the aid of the Commission in carrying out voluntary reorganizations designed to satisfy the integration and corporate simplification requirements. If, after hearing, the Commission finds such a plan necessary to effectuate the provisions of Section 11(b), and fair and equitable to the persons affected by the plan, the Commission is directed to issue an order approving the plan.

"On August 3, 1938, William O. Douglas, former Chairman of the Commission, addressed a letter to the chief executives of all registered holding companies, requesting them to inform the Commission as to their tentative plans for compliance with Section 11(b). Since publication of such tentative plans might be misleading, the Commission stated that they would be treated as informal and confidential. The purpose of this request was to focus the attention of the industry upon the steps needed to comply with the statute, and to assist the Commission in determining the best procedure to secure such compliance, as well as to obtain both data and ideas that might prove helpful to the Commission. With few exceptions, the registered holding companies submitted more or less elaborate statements in response to this request. These have been carefully studied and analyzed, and have aided considerably in the formulation of working plans for securing compliance with the statute. The *next step* is the specific and separate determination of each company's problem, a matter which in each case must be based on the evidence produced, both by the Commission and the company, at a public hearing." (pp. 69-70).

No such step was ever taken with respect to Electric.

On February 28, 1940, the Commission instituted integration proceedings against Bond and Share, Electric and the other sub-holding companies by Notice of and Order for Hearing pursuant to Section 11(b)(1) (Holding Company Act Release No. 1944). This notice identified and specified the location of the companies in the Bond and Share system, concluded that the system was not integrated, and requested each company (including Electric) to explain its position with respect to the proceeding. Further, each company was to state what action should be taken in order that the operations of *each registered holding company* system (including

Electric's) be limited to a single integrated public utility system pursuant to Section 11(b)(1). After some preliminary motions, not here material, no further steps were taken and no hearings were held in that proceeding.

The present proceeding was instituted on May 9, 1940, by Notice of and Order for Hearing pursuant to Section 11(b)(2). (R., Vol. I, 27). The interrelation of the two proceedings was thus stated by the Commission:

> "The Commission instituted Section 11(b)(1) proceedings directed against the Electric Bond and Share system on February 28, 1940. The subsequent Section 11(b)(2), or corporate simplification proceedings, indicated that progress in eliminating the innumerable corporate complexities of the system would facilitate securing compliance with the integration requirements of the Act. As a consequence, the integration proceeding has been held somewhat in abeyance pending progress in the corporate simplification proceedings." (*Seventh Annual Report of the S. E. C.*, Fiscal Year Ended June 30, 1941, p. 78.)

When it appeared, however, from the course of this proceeding, that the Commission was concerned solely with corporate simplification and only with the Bond and Share system, Electric formulated a plan for the integration and simplification of its system, which was filed with the Commission on December 4, 1941, pursuant to Section 11(e). (R., Vol. II, 479). As this plan covered the full subject matter of Section 11(b), Electric made a formal motion to consolidate its application for approval of its plan with the pending proceedings. (R., Vol. II, 473). This motion was denied, but not until eight and one-half months after it was made, in the following language:

> "It appears that if consolidation were granted, the result would be to inject into the present proceeding

> issues of fact and law in many respects different from, and unrelated to, those here involved. In consequence, no useful purpose would be served by permitting the consolidation of the 11(e) Plans with the present proceeding, but on the contrary, delay and confusion would inevitably result. Accordingly, the motion for consolidation will be denied." (R., Vol. II, p. 533).

The interrelation of integration and simplification of existing holding company systems was thus squarely rejected by the Commission in clear violation of the full mandate of Section 11.

The order dissolving Electric was entered on August 22, 1942 (R., Vol. II, 652), nearly seven years after the enactment of the Public Utility Holding Company Act of 1935. The Commission has had nearly seven years in which to formulate its plan, required by Section 11(a), for the geographical integration of public utility holding company systems, of which Bond and Share and Electric are among the most important. The sporadic and halting manner in which the Commission has proceeded with respect to the system of Bond and Share and the system of Electric and the other sub-holding company systems, culminating in the dissolution of Electric and other sub-holding companies, amply shows that the Commission has not complied with the Congressional mandate and has not performed the duties enjoined upon it by Section 11.

The integration provided for in Section 11 was not to be accomplished by the physical removal of operating properties from one place to another, but by the reordering of corporate relationships of existing holding company systems pursuant to some over-all plan arrived at under Section 11(a). There is a point at which integration and simplification are inextricably intertwined. The Commission itself has clearly recognized this fact. Yet the record in

this proceeding is barren of any determination by the Commission of the extent to which either Electric or Bond and Share may be integrated, or, for that matter, of the extent to which the corporate structure of Electric may be simplified.

The Commission may not pursue one purpose of Section 11(b) to the exclusion of the other; it may not pursue simplification in such a manner as to make integration impossible.

Electric Cannot be Dissolved in the Absence of a Finding that it is not a Proper Vehicle for the Integration of Its Southern System

Electric does not urge either that Section 11(b)(1) proceedings must precede proceedings under Section 11(b(2) or that Section 11(b)(2) proceedings may not be had independently of integration. Simplification pursuant to Section 11(b)(2) may proceed independently of integration under Section 11(b)(1). *Cf. Commonwealth & Southern Corporation* v. *Securities and Exchange Commission,* 134 F. (2d) 747 (C. C. A. 3rd, 1943). But simplification cannot proceed inconsistently with and in contravention of Section 11(b)(1). Electric is the only visible means of integrating a great regional system as required by the statute. Simplification to the point of dissolving Electric cannot be supported without a finding by the Commission that Electric is not a proper vehicle for such integration. No such finding has been made.

Simplification and integration of existing holding company systems are coordinate objectives of the Act. The dissolution of the five major sub-holding companies of Bond and Share cannot be said to contribute to the objective of integration. Bond and Share will either be left with statutory "control" of an impossibly unintegrated scattering of utility properties, or, in so far as control is lacking, integration will be out of the question. Therefore, the dis-

solution of Electric is in clear derogation of the purposes of Section 11(b)(1).

Whatever may be said as to the status of its other properties under Section 11(b)(1), Electric has an interconnected southern electric system in Arkansas, Louisiana and Mississippi—a system which may be said to be at least *prima facie* an "integrated public-utility system" within the meaning of Section 2(a)(29). The Federal Trade Commission, predecessor of the Securities and Exchange Commission in the administration of the various securities statutes and the investigatory body which laid a large part of the factual foundation on which the Act was passed, described Electric's southern system, as follows:

> "Gridironing a large part of Arkansas, northeastern Louisiana, and western Mississippi is a group of connected electric utilities owned by Arkansas Power & Light Co., Mississippi Power & Light Co., and Louisiana Power & Light Co. and a subsidiary" (Rep. F. T. C., 70th Cong., 1st Sess., Sen. Doc. 92, Part 72-A, 89).

This southern system was planned as a system and exists today as a system. A map showing the properties embraced within the system is set forth in the back of this brief as Appendix C.*

Originally planned by prior owners as a somewhat smaller system in eastern Arkansas, northern Louisiana and western Mississippi, the territory covered by the southern system formerly contained hundreds of small isolated and inefficient power plants. Today integration has been largely accomplished, with the result that the territory is now served mainly by eight principal plants, with 28 addi-

* The red lines on this map (Respondent's Exhibit 299 in the proceeding) show the electric system as of January 1, 1940. The map is substantially correct as of today, with the exception that the Dallas properties are not now proposed to be included in the system.

tional smaller plants used chiefly for standby, emergency and peak-load purposes. The principal plants are of a modern design and a degree of efficiency in operation undreamed of in the pre-holding company days.

As shown by the map above referred to, the integration which began under such prior owners and which since 1925 has been carried on and enlarged by Electric has resulted in the development of a coordinated unit for the generation and distribution of electricity throughout the entire region. The separate corporations which form parts of this unit are in each case dependent upon some phase of the system outside of their own corporate properties in order to render the service which they are now able to render. Steam plants of one company are brought into balance with hydro plants of another. To destroy the system would be to destroy the full effectiveness of its component parts (Tr., pp. 3037-3058, 3281-3283).

The fact that the utility properties in Electric's southern system have been integrated under Electric's control has resulted in vast improvements to consumers and to investors and has contributed largely to the development of the region where the system is located. Technical, engineering and managerial direction has been given to the southern system companies by the holding-company system of which Electric is a part, and Electric is prepared to show that in the future it will be able to make available to this system all the advantages of centralized technical, engineering and managerial direction.

That some of these advantages have in the past been attributable to the system of which Electric is a part, rather than to Electric standing alone, is irrelevant. The questions before the Commission under Section 11 relate rather to the useful functions which Electric as a regulated

holding company could perform for its integrated system in the future.*

The Act was intended as a statute of constructive regulation, not as a purely punitive measure. Destruction of existing companies, if an end at all, is certainly not an end in itself. A study of the structure and purposes of the Act shows that regulation was proposed to be facilitated by integrating the holding company properties into geographical systems, as well as by simplifying their corporate structures.

Section 1(b)(4) of the Act says that the interests of the public, investors and consumers are or may be adversely affected when the growth of holding companies bears no relation to "integration and coordination of related operating properties." Section 2(a)(29) defines the term "integrated public-utility system" with such emphasis on the advantages of integration as to negative any intent to jettison such advantages. Section 10(c)(2) mentions integration among the tests to be applied by the Commission in passing on an application for acquisition of utility securities or assets. And the command of Section 11(b)(1) of the Act is: "It shall be the *duty* of the Commission, as soon as practicable after January 1, 1938: (1) to require by order, after notice and opportunity for hearing, that *each* registered holding company," of which Electric is one, shall take such steps as the Commission shall find necessary to limit the operations of the holding-company system to an integrated public utility system or systems.

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* The most extended study of public utility holding companies is that of the Federal Trade Commission, made pursuant to Sen. Res. 83 (70th Cong., 1st Sess.), which is cited in Section 1(b) of the Act. For the convenience of the Court, excerpts from the Federal Trade Commission reports, showing the recognized social and economic advantages of public utility holding companies, are annexed to this brief as Appendix B.

The status of Electric and its southern system under Section 11(b)(1) is, therefore, clear, as is the duty of the Commission with respect thereto.

Electric Has a Statutory Right to a Hearing on Its Plan

Moreover, Section 11(e) of the Act gives Electric the clear privilege to present a plan for bringing itself into conformity with the requirements of Section 11(b) and the right to a hearing on such a plan. The provisions of Section 11(e) so far as material are:

> "* * * any registered holding company or any subsidiary company of a registered holding company *may*, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, *after notice and opportunity for hearing*, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission *shall* make an order approving such plan * * *."

The requirements of this section also bring into sharp focus the error of the Commission in assuming that it need not deal with Electric and Electric's system but need only deal with Bond and Share and its system. Section 11(e) says that "any registered holding company [of which Electric is one] or any subsidiary company of a registered holding company [of which Electric is one] may * * * submit a plan to the Commission" for the taking of action "for

the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of Subsection (b)." As stated in *Commonwealth & Southern Corporation* v. *Securities and Exchange Commission*, 134 F. (2d) 747 (C. C. A. 3rd, 1943), in discussing the rights of holding companies under Section 11(e):

> "It will thus be seen that the congressional purpose is to leave open to the holding companies a broad area of discretion in determining just how they are to bring their systems into compliance with the required standards" (p. 751).

It follows, therefore, that Electric had a clear right to present a plan and that it had a clear right to a hearing on the plan which it presented. It is submitted that in order to render these statutory rights of any real value, Electric was also entitled to such hearing on its plan in advance of being ordered to dissolve.

The Disposition of Electric's Plan for Simplification and for the Integration of Its Southern System by the Commission and by the Circuit Court of Appeals

As noted above, the effort on the part of Electric to exercise its rights under Section 11(e), and to bring integration problems into the present proceeding by consolidating the present proceeding with Electric's application for approval of its plan under Section 11(e), was rejected by the Commission.

The Commission's discussion of Electric's plan was entirely concerned with its 11(b)(2) aspects, and the plan was said to be inadequate, without a hearing thereon, primarily because it did not provide for the divorcement by Electric of Bond and Share's control of Electric. Such action by Electric itself is, of course, impossible. The di-

vorcement of Bond and Share's control can be effectuated only by order of the Commission or by voluntary action on the part of Bond and Share. The very wording of the Act shows that there was no intent to foist upon Electric the impossible burden of attempting to sever the Bond and Share control; Section 11(e) permits a company to submit a plan "for the purpose of enabling such company or any *subsidiary* company thereof"—not a parent company thereof—to comply with the provisions of Section 11(b).

The part of Electric's plan which provided for integration was, in effect, not considered at all by the Commission. Only in connection with the reiteration of the argument that Electric should be dissolved under Section 11(b)(2) because of lack of "function" did the Commission advert to integration; and it did so in the following way:

> "There is nothing about the sub-holding companies which makes them vehicles for holding together a single integrated system in any respect superior to any other corporate entity, and in fact *it would seem* that a company specially formed for this purpose, with appropriate domicile and a charter and by-laws free from the complexities found in those of American and Electric, would be far preferable. More important *it is not at all certain* on the present record that either American or Electric possesses any 'single integrated system' which requires a holding company to hold it together. *Without making any judgment on these points at this time*, it may be stated that *our uncertainty* arises from two causes: first, *it is an open question* whether American and Electric will be able to sustain their claims as to their alleged 'integrated systems', or as to their right to retain alleged additional systems under the standards of Section 11(b)(1); secondly, in the light of data in the record concerning write-ups in the property accounts, depreciation policies, and earnings histories of the sys-

tem companies, *there likewise exist substantial questions* as to the equity of American and Electric in many of the subsidiaries which they claim as important parts of their systems; *if it should later be determined* that little or no equity exists in certain such companies, they of course would not be retainable apart from the standards of Section 11(b)(1)" (R., Vol. II, pp. 645-6).

Thus, the whole matter of integrating the existing public utility holding company system of Electric is light heartedly dismissed by the Commission in terms of pure conjecture. There is no responsible determination that Electric either is or is not an appropriate vehicle for the integration of its southern system pursuant to the mandate of Section 11(b)(1). Nor was there any hearing on the matter.

The Circuit Court of Appeals followed the Commission's lead, in the following language:

> "The Commission considered the suggestion that petitioners might be left in existence to perform the function of holding together integrated public utility systems as contemplated by §11(b)(1), and observed: 'There is nothing about the subholding companies which makes them vehicles for holding together a single integrated system in any respect superior to any other corporate entity, and in fact it would seem that a company specially formed for this purpose, with appropriate domicile and a charter and by-laws free from the complexities found in those of American and Electric, would be far preferable.' As we understand the orders under review, it is open to each of the petitioners, in submitting plans for effectuation of the orders, to propose a reorganization along these lines looking toward the creation of a new holding company" (R., Vol. IV, pp. 890-1).

It is respectfully submitted that Congress did not intend the statutory objective of integrated public utility holding

company systems to be disposed of in this summary and ill-considered manner. The Commission cannot evade its functions under Section 11(b)(1) by disparaging plans submitted under Section 11(e), upon which hearings have not been held. Nor can the Circuit Court of Appeals dispose of Electric's rights under Section 11(b)(1) by speculating that Electric might be permitted by the Commission to reorganize and, as reorganized, to retain its southern system.

The Divorcement of Electric from Bond and Share

While it is not for the Circuit Court of Appeals or for this Court to determine on this appeal what specific action the Commission should take with respect to the Electric system pursuant to Section 11, it is still the function of judicial review to see to it that the Commission observes those rights accorded by Congress in specifying the standards to be applied under the Act. The Commission may have latitude for discretion in its choice of a remedy for a particular situation, but that discretion must be exercised within the orbit of the Congressional purpose.

It is perfectly clear that the objections of the Commission to the effect of the continued existence of Electric in the Bond and Share system can readily be remedied by severing the Bond and Share control. If the Commission does not believe that an integrated and simplified Electric system can remain in the Bond and Share system without complicating the structure of the Bond and Share system or unfairly distributing its voting power, then severance of the Bond and Share control is the only remedy consonant with the requirements of integration.

The Circuit Court of Appeals recognized the plausibleness of this procedure, but refused to enjoin it upon the Commission because:

> "The present litigation is but part of a larger proceeding instituted by the Commission to deal in accordance with the statutory mandates with the whole Electric Bond & Share system and all of its component parts. We are not in a position now to size up the whole broad situation, nor do we know what the Commission may have in mind to do with the many Bond & Share problems which will remain after the present cases, dealing with two of Bond & Share's subholding companies, are disposed of." (R., Vol. IV, 889).

It is true that the Commission's task with respect to Electric is a part of its broader task of integrating and simplifying the corporate structure of the entire public utility industry in a coherent manner, all the aspects of which cannot be before the courts in a single proceeding. The argument does not, however, justify dealing with Electric contrary to the statutory mandate or in a manner not supported by the record.

The error of the Commission in this case lies in rigidly confining its attention to Bond and Share, disregarding Electric, and thus disposing of Electric in such a way as to frustrate the purposes of Section 11(b)(1). There is nothing in the statute requiring the Commission to think only in terms of top holding companies. Indeed the requirements of the statute are, in some situations, quite to the contrary, as the Commission itself recognizes. *In the Matter of The United Light and Power Company, et al.*, 9 SEC 833 (1941) is an apt illustration. There the Commission decided that Section 11(b)(1) required it to proceed, not from the top down, but from the bottom up:

"Under Section 2(a)(9) of the Act, a holding company system is defined to include 'any holding company, together with all its subsidiary companies.' Under this definition it is evident that the holding company system of the top holding company (The United Light and Power Company) comprehends all of its subsidiaries, direct and indirect; in other words, it includes all of the companies which are respondents in either of the pending proceedings. Each of the other registered holding companies which is a respondent, however, may similarly be said to have a holding company system of its own, which includes the holding company in question together with its own subsidiaries. * * *

"In considering what action should be ordered to be taken by the respondents pursuant to Section 11(b)(1) of the Act, therefore, we will consider in turn the application of the standards of the Act to the holding company system of each registered holding company which is a respondent. For this purpose, it is appropriate to commence at the bottom of the pyramid and to conclude with the holding company system of The United Light and Power Company, which as indicated comprehends within it all of the holding company systems of the various subholding companies." (pp. 838-9).

Electric cannot, of course, ask this Court to order the Commission to follow a particular course or to select the remedy of divorcing Bond and Share's control of Electric. Its purpose here is to point out that the Commission has available remedies consonant with the full intent of Section 11. In such a situation, and in the absence of a finding that Electric is not a suitable means for integrating its southern system, it is submitted that the order of dissolution cannot stand. In the exercise of its discretion the Commission must choose a remedy that will forward, not make impossible, the purposes of the Act.

POINT II

THE FINDINGS OF THE COMMISSION IN THIS PROCEEDING CANNOT SUPPORT THE DISSOLUTION OF ELECTRIC UNDER SECTION 11(b)(2).

The Notice of and Order for Hearing, dated May 9, 1940, initiating this proceeding under Section 11(b)(2) stated that the purpose of the proceeding was, among other things, to determine:

> "whether it is necessary to discontinue the existence of, or modify the corporate structure of, or redistribute the voting power among security holders of, said Electric Bond and Share Company or any of the other respondents herein; * * *"

and:

> "what further action, if any, is necessary and shall be required to be taken by the respondents herein, or any of them, to ensure that the corporate structure or continued existence of any of the respondents herein does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of the holding company system of Electric Bond and Share Company; * * *" (R., Vol. I, 50).

By order of the Commission dated June 7, 1940, the purpose of the proceeding was subsequently confined:

> "to the issue of whether it is necessary to discontinue the existence of American Power & Light Company, *Electric Power & Light Corporation*, National Power & Light Company, and American Foreign Power Company, Inc., or any of them, in order to ensure that the structure of the holding company system of Electric Bond and Share Company shall not be unduly or unnecessarily complicated and

that voting power shall not be unfairly or inequitably distributed among the security holders in that system'' (R., Vol. I, 66).

Whatever might have been accomplished by the Commission consonant with the requirements of Section 11 under its original Order, this limitation of issues effectively precluded consideration of the impact of Section 11 upon the Electric system as such. With the case thus framed, the Commission was committed to the view that the focal point of attack upon a two-layer holding company system must be the intermediate holding company, and that if complicated structure or wrongful distribution of voting power is found, the dissolution of the intermediate holding company is automatically and without more the sole appropriate remedy.

The Fact that Electric is an Intermediate Holding Company in the Bond and Share System is not Ground for Dissolution under Section 11(b)(2)

The basic facts relied upon by the Commission may be simply summarized. The percentage of the total voting power of the securities of its public utility subsidiaries owned by Electric ranged from 95.4% in the case of Louisiana Power & Light Company to 61.6% in the case of United Gas Corporation. The percentage of the capitalization of the subsidiaries represented by the securities owned by Electric is averaged by the Commission at 39.21%. This percentage is then reduced by various ''adjustments'' from 39.21% to 32.72%, and finally to 15.65% (R., Vol. II, 622-3).

The percentage of the total voting power of the securities of Electric owned by Bond and Share is stated as

46.8%, which is said to represent 9.14% of Electric's capitalization. The result is said to be that Bond and Share "is vested with control of the Bond and Share-Electric system through ownership of common and preferred stock of Electric equal to 9.14% of Electric's capitalization, which represent an interest of only 8.72% in the total capitalization of Electric's subsidiaries *before* adjustment for write-ups and depreciation and depletion" (R., Vol. II, 624).*

The Commission concludes:

> "On the basis of the foregoing figures, it is apparent we must find that voting power is unfairly and inequitably distributed among the security holders of the Electric system and among the security holders of the Electric-Bond and Share system; and accordingly that the continued existence and capital structure of Electric unfairly and inequitably distribute voting power among security holders of the Bond and Share system" (*ibid*).

Turning to complexity, the Commission again bases its case on "pyramiding" alone. Thus, in addressing itself to the stated issue, the Commission says:

> "Not only are the continued existence and corporate structure of American and Electric offensive to the voting power distribution standards of Section 11(b)(2), but we find that these companies also contribute in substantial measure to the undue and unnecessary complexity which exists in the Bond and Share system in contravention of that section. *It is evident that both results follow from the basic circumstance that these companies constitute pyramiding devices, and that such results are in effect reverse sides of the same coin.*" (R., Vol. II, 624-5).

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* Italics in original.

The order of dissolution cannot be properly based upon complexity or unfair distribution of voting power within the Electric system and the effect thereof upon such system. Neither complexity nor unfair distribution of voting power within the Electric system was within the issues of this proceeding nor could either be responsibly remedied by killing the patient. The mass of corporate statistics and the Commission's arguments with respect thereto lead to the single conclusion that complexity and unfair distribution of voting power both result from the "pyramid" created by the existence of Electric as an intermediate holding company in the Bond and Share system.

This is further brought out in the Commission's discussion of steps voluntarily taken to bring Bond and Share and the major sub-holding companies into closer conformity with the Act. Thus, in disposing of certain organizational changes made as early as 1935, the Commission discloses its preoccupation with "pyramiding" to the exclusion of all else:

> "• • • *we doubt that even changes of the most drastic character in the structures of the Bond and Share system and the subholding companies could have saved the latter from the impact of Section 11(b)(2)*, because, as we stated in our National Opinion, the subholding companies having been conceived and utilized solely as *pyramiding devices* in the Bond and Share system, 'thus stood squarely within the focus of the statutory intendment'." (R., Vol. II, 598).

One of the purposes of a holding company system is to "pyramid" to a greater or lesser extent, and holding company systems up to the third degree are recognized by the Act. The only case in which Congress proscribed holding company systems for "pyramiding" alone is the case of third-degree holding companies. Even there the remedy is

not dissolution. The Commission is merely told, in carrying out of the provisions of Section 11(b)(2) to "require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company."

Assuming all the Commission says as to complexity and unfair and inequitable distribution of voting power in the Bond and Share system to be true, Section 11(b)(2) still does not authorize the dissolution of Electric solely because it has a pyramiding effect in that system.

Earlier drafts of Section 11 required the Commission to do away with all holding companies who were not holding companies in the first degree holding a certificate of necessity from the Federal Power Commission. The section was the most bitterly contested provision of the entire Act, and as finally enacted, the section, as stated above, proscribes only holding companies to the third degree. With respect to all other holding companies and holding company systems, the Commission is to apply the requirements of Section 11 as a whole.

The Commission's argument that only dissolution accomplishes the purposes of Section 11 effectively and promptly is like urging that amputation at the neck would solve a multitude of human ills. The Commission's task is not so simple. Its duty is of a more expert, constructive and affirmative nature, namely, not only to bring existing holding company systems into geographical integration so far as possible, but also to simplify the corporate structure of existing holding company systems so far as possible. Again, the fallacy of the Commission's reasoning lies in its

refusal to recognize Electric's statutory rights. It is the corporate structure of Bond and Share which offends, and which can be cured simply by divorcing Bond and Share's control of Electric.

Lack of Factual Support for Dissolution Order.

The American brief makes a detailed analysis of factual data and we shall not, therefore, burden the Court with further analysis of that nature, beyond pointing out a few illustrations of the shocking extent to which the "facts" respecting Electric are misstated by the Commission's opinion.

In discussing distribution of voting power with respect to Electric (R. Vol. II, pp. 622-624), the Commission sets forth certain figures as to the investment by Electric in its subsidaries in terms of book value on the books of such subsidaries. On that basis Electric had an investment of 39.21% of the total capital, including debt securities and surplus, of its subsidiaries as a whole. The Commission's order obviously is not based upon this 39.21% figure, in view of the fact that the Commission considers 25% to 30% to represent an adequate investment to support controlling voting power. *Matter of Puget Sound Power & Light Company,* SEC Holding Company Act Release No. 4255, April 27, 1943; *Matter of Mississippi Power & Light Company and Electric Power & Light Corporation,* SEC Holding Company Act Release No. 5237, page 10, August 21, 1944.

The Commission, therefore, goes on to make certain adjustments for alleged "write-ups" and alleged insufficiency of depreciation and depletion, without making any findings regarding any of these matters. Such write-ups and such depreciation and depletion inadequacies are dealt with as pure assumptions and on an "if" basis, and on such

basis the Commission reduces Electric's investment in its subsidiaries, first to 32.72% and then to 15.65%.

The keystone of the Commission's opinion on this fundamental matter of distribution of voting power rests "on the basis of the foregoing figures" (R. Vol. II, p. 624). And yet the Commission's guesses, hypotheses and assumptions, which are the basis of "the foregoing figures," can be shown by the Commission's own decisions to be completely unrealistic.

For example, in Appendix F-2 to the Commission's opinion (R. Vol. II, p. 667), which sets forth in detail the manner in which "the foregoing figures" were arrived at, Electric's investment in Idaho Power Company, as "adjusted" by the Commission, is shown to be $5,603,794. Yet the Commission approved a series of transactions pursuant to which Idaho Power Company made all the adjustments on its books required by the Commission, the Federal Power Commission and the Oregon and Idaho state regulatory authorities, leaving in Electric's hands common stock of a par value of $9,000,000 and a book equity of $9,929,000 (SEC Holding Company Act Release No. 4494, p. 4, August 14, 1943), and subsequently approved the sale of such common stock to the public for $10,361,250 (SEC Holding Company Act Release Nos. 4458 and 4527, July 29 and August 31, 1943).

Similarly, in Appendix F-2 Electric's investment in United Gas Corporation, as "adjusted" by the Commission, is shown at only $60,460,109. Yet United Gas Corporation has been reorganized under Section 11 pursuant to an order of the Commission and in such reorganization Electric has been accorded new common stock having a par value of $101,081,010 (SEC Holding Company Act Release No. 5271, September 7, 1944).

Also, in Appendix F-2 Electric's investment in Mississippi Power & Light Company, as "adjusted" by the Commission, is shown at $114,999. Yet a series of transactions has since been consummated by Electric and Mississippi Power & Light Company under an order of the Commission pursuant to which all matters complained of in the accounts of Mississippi Power & Light Company have been eliminated or provided for (SEC Holding Company Act Release No. 4888, February 12, 1944) and Electric after such transactions held common stock of Mississippi Power & Light Company having a stated value of $2,500,000. A further transaction, including a capital contribution of $2,018,200 by Electric, raised the equity of Electric in Mississippi Power & Light Company to $5,069,500 (SEC Holding Company Act Release No. 5237, p. 13, August 21, 1944).

Again, in Appendix F-2 Electric's investment in Louisiana Power & Light Company, as "adjusted" by the Commission, is shown at $181,841. Here also a series of transactions by Electric and Louisiana Power & Light Company have resulted in conformity with the orders of regulatory authorities with respect to the accounts of this company (SEC Holding Company Act Release No. 4797, December 29, 1943), and Electric owns after such transactions common stock of Louisiana Power & Light Company having a stated value of $6,000,000, and an equity of $6,815,000 (SEC Holding Company Act Release No. 4977, p. 3, April 7, 1944).

The figures given are taken from column (13) in Appendix F-2. They happen to be figures which can be tested against definitive and officially reported action taken by

the Commission since it made the guesses represented by that column.*

A further illustration of the unrealistic approach of the Commission, underlying its "foregoing figures," is also afforded by Appendix F-2. After reducing Electric's investment in all its subsidiaries on the basis of fallacious "adjustments" illustrated above, the Commission says that Electric has a "negative investment" in Utah Power & Light Company represented by a red figure of $28,000,000. The Commission then deducted this "negative investment" in the Utah company from investments of Electric in its other subsidiaries. This is not an algebraically negative figure; at most it means that stock alleged to have been issued without consideration is worth nothing. And the status of Electric's investment in one subsidiary can have no possible effect upon the status of its investments in others.

Such are the "foregoing figures" upon which the Commission based its "finding" as to distribution of voting power. Such is the character of the assumptions, guesses and hypotheses forming the "factual" basis of the entire "Findings" and Opinion.

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*It is true that there is a difference in time between the figures shown in Appendix F-2 and the definitive determinations by the Commission with which we have compared those figures. Nevertheless, the time differential is insufficient to explain the startling difference between the so-called "findings" constituting the "foregoing figures" upon which the Commission bases its conclusion of inequitable distribution of voting power, and the subsequent definitive determinations.

Moreover, the Commission cannot explain away this wide discrepancy between the figures in Appendix F-2 and the subsequent definitive determinations by adverting to amounts in Account 100.5 (Plant Acquisition Adjustments) of the Uniform System of Accounts, which, in some cases, are currently being amortized; for the Commission's opinion expressly excludes Account 100.5 from its "foregoing figures" and the figures in Appendix F-2 (R., Vol. II, 623).

In only one of the situations referred to above has the Commission imposed a dividend restriction in order to build up the common stock equity. This is in the Mississippi Power & Light case and the amount required to be added to surplus through such dividend restriction was less than $1,000,000.

The Order Dissolving Electric is Arbitrary and Unreasonable.

Although the Findings and Opinion of the Commission consist almost entirely of a catalogue of accusations leveled against Bond and Share and arising out of the control of Electric by Bond and Share, the order of the Commission results in losses and penalties to Electric, its subsidiaries, their security holders and the consuming public. The infirmity of the Commission's order in this respect goes deeper than a mere question of the selection of an administrative remedy. This case presents the arbitrary imposition of a remedy upon the wrong person. The entire import of the Commission's opinion is focused on the evils growing out of control of Electric by Bond and Share. The whole argument revolves around the statutory offensiveness of that control. With the powers which the Commission claims to have, the severance of that control presented a simple, direct remedy which could have been readily applied. The drastic remedy of dissolving Electric, the investment medium of more than 24,000 members of the public, is entirely unsupported by any reasonable basis.

Even if there were no decision on the subject, common sense and the dictates of fairness and justice would require that there be some relationship between a situation to be remedied and the remedy selected, between the "guilty person" and the person penalized. This is particularly true where a court or administrative body has discretion as to these matters, as the Commission claims it has here. If someone must suffer by the application of the remedy, the sufferer should be the one who committed or controlled the acts regarded as wrongful. Clearly, according to the Commission, Bond and Share was that person. We ask again, therefore, the question which to us throws into sharp

relief the Commission's error and which to us is unanswerable: Why did not the Commission adopt the simple remedy of severing the Bond and Share control of Electric, instead of one so injurious to the investing and consuming public?

So far as the petitioner knows the drastic remedy of dissolution has never been applied where an alternative remedy less harmful to innocent persons is available. See *Standard Oil Co.* v. *United States*, 221 U. S. 1, 78, 81 (1911); *United States* v. *American Tobacco Co.*, 221 U. S. 106, 184-185, 187 (1911); *United States* v. *United States Steel Corporation*, 251 U. S. 417, 457 (1920).

With respect to the Commission's protestations that dissolution is a simple remedy for the complex problems with which it is faced, the decision of this Court in *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177 (1941) is a complete answer. There the Court had under review an order of the N. L. R. B. requiring an employer to make certain employees whole for loss of pay resulting from an unfair labor practice. The Board had refused to go into the question of whether damages might have been mitigated by the individual employees through other employment and defended this approach on the ground of simplicity. In deciding against the Board on this point, the Court stated:

> "But the advantages of a simple rule must be balanced against the importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment." (p. 198)

Indeed the Commission's only justification for the order of dissolution is that, while it admitted that other remedies were available, in its judgment the present order was capable of prompt execution and avoided further hearings

and administrative difficulties (R., Vol. II, pp. 636, 640, 646-647). The above authorities sufficiently answer this argument of convenience.

We submit that on the basis of the principles enunciated in the foregoing cases alone, and even if there were no other infirmities in the Commission's order, it should be nullified and set aside.

CONCLUSION

The order of the United States Circuit Court of Appeals for the First Circuit should be reversed with directions that the order of the Securities and Exchange Commission issued August 22, 1942, be set aside.

Respectfully submitted,

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October 15, 1945.

Appendix A.

Excerpts from Public Utility Holding Company Act of 1935.

Section 11.

(a) It shall be the duty of the Commission to examine the corporate structure of every registered holding company and subsidiary company thereof, the relationships among the companies in the holding-company system of every such company and the character of the interests thereof and the properties owned or controlled thereby to determine the extent to which the corporate structure of such holding-company system and the companies therein may be simplified, unnecessary complexities therein eliminated, voting power fairly and equitably distributed among the holders of securities thereof, and the properties and business thereof confined to those necessary or appropriate to the operations of an integrated public-utility system.

(b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

(1) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system: Provided, however, That the Commission shall permit a registered holding company to continue to control one or more additional integrated public-utility systems, if, after notice and opportunity for hearing, it finds that—

(A) Each of such additional systems cannot be operated as an independent system without the loss

of substantial economies which can be secured by the retention of control by such holding company of such system;

(B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country; and

(C) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation.

The Commission may permit as reasonably incidental, or economically necessary or appropriate to the operations of one or more integrated public-utility systems the retention of an interest in any business (other than the business of a public-utility company as such) which the Commission shall find necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems.

(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary com-

panies which itself has a subsidiary company which is a holding company. Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public utility company.

The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist. Any order made under this subsection, shall be subject to judicial review as provided in section 24.

* * * * * *

(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commision shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate

the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed.

Appendix B.

Excerpts From Federal Trade Commission Report On Public Utility Holding Companies.

Public Utility Holding Companies Compared With Other Businesses.

It was recognized by the Federal Trade Commission that many attributes of the public utility holding company, whether good or ill, are common characteristics of business generally, both within and without the utility field.

> "In this connection it is important to note that some of the matters referred to here are not peculiar to utility holding companies but may be found also among other types of commercial corporations. It is, likewise, important to note that some of them—whether advantages or detriments—are not necessarily inherent conditions, but depend upon the circumstances and methods of organization or on the personal characteristics and motives of the individuals who are in control of the management. It should also be noted that utility holding companies are concerned with businesses of a semimonopolistic character and may be considered as not subject to the same degree of restraint through competition as corporations engaged in wholly competitive businesses." Rep. F. T. C., 70th Cong., 1st Sess., Sen. Doc. 92, Part 72-A, 831.

Economic Need for Holding Companies.

It is expressly recognized that the organization of holding companies was called for by a pressing economic need and was at least not inconsistent with sound social theory.

> "The basis for holding companies in the electric and gas utility fields lies, on the one hand, in certain economic needs of small operating companies for

financial, engineering, and managerial services and, on the other hand, in the personal ambitions of the individuals who form the holding companies. The distinction between these service functions and the personal motives, or practices, of the organizers should not be lost sight of. The two are not necessarily antagonistic. If the promotion of the organizers' purposes is accomplished only through straightforward performance of these service functions, such promotion may be in accord with the theory underlying the general industrial organization on the basis of private ownership and private intiative for profit." Rep. F. T. C., 70th Cong., 1st Sess., Sen. Doc. 92, Part 72-A, 118.

That the holding company solved the important problems which called it into existence is recognized.

"With the realization of the possibilities of long distance transmission, connection between various adjacent systems and wide-spread distribution, as well as the acceptance of purchased power by large industry and the development of use for heating purposes following lighting and power, the holding company idea became active. To acquire sufficient existing plants, to reach apparently desirable locations for sale of electric energy and to construct the economical new plants and necessary transmission lines required the command of large financial resources as well as a unity in direction and control of property which was not possible, due to existing laws, through the direct ownership by one corporation of operating properties in many communities and especially in several States. The holding company solved these problems. To realize the possibilities, as visualized, required the construction of much new property, the retirement to reserve status, or abandonment, of much older property and increases in net earnings both by enlarging the total

revenues and reducing operating expenditures." Rep. F. T. C., 70th Cong., 1st Sess., Sen. Doc. 92, Part 72-A, 776.

Physical Integrations Under the Holding Company.

The desirability of physical integrations of public utility properties was one of the compelling reasons for the development of the public utility holding company.

"This subject must also be viewed from an historical angle. The electric and gas utility development has had a phase of free-lance pioneering in which rapid development was facilitated, though marred by many greedy profit-seeking methods. The holding company, especially in view of laws in many States, was often the readiest means of bringing together many unconnected operations lying in different States (and also, indeed, within a single State) into one connected unit of operation. Such a grouping of adjacent communities connected by means of transmission lines made it possible in many cases to construct more efficient central stations of large capacity and thus to reduce the costs of generating electricity or to utilize combinations of steam and hydro generating plants in a more economical manner, sometimes in part to the advantage of various classes of consumers in the reduction of rate schedules. A development similar in many respects occurred to a certain extent in natural gas which generally required the building of interstate transmission pipe lines and the acquisition of reliable outlets for such gas through an interest in (or long-term contracts with) local utilities in the areas served." Rep. F. T. C., 70th Cong., 1st Sess., Sen. Doc. 92, Part 72-A, 832-833.

"The large systems of electric and gas companies which have been built up under holding company control have resulted principally from the continuous purchases of independent operating companies by

holding companies. As a foothold was gained by a holding company in some locality, control of other operating companies nearby generally was obtained which led in time to the control by the holding company of a number of operating companies in the same territory. The control of such a number of companies in a given area naturally resulted in their unification in the course of time; large successor companies resulted from this unification and from the construction work involved, particularly in the erection of large central electric stations in place of the more or less obsolete plants which came under the control of the holding company." Rep. F. T. C., 70th Cong., 1st Sess., Sen. Doc. 92, Part 72-A, 179-180.

These integrations are recognized to have been carried out in a highly efficient manner.

"This centralization of companies has resulted generally in economy of operation in the production and distribution of electrical energy by eliminating duplicate generating and transmission facilities and the scrapping of obsolete facilities, with a consequent savings in capital expenditures and the accompanying operating costs, together with the greater utilization of waste power and potential power." Rep. F. T. C., 70th Cong., 1st Sess., Sen. Doc. 92, Part 72-A, 250.

"Occasionally small and unprogressive communities may be found in which old distribution equipment has been left in place with indifferent maintenance when under the control of a holding company. But in general, the holding-company systems appear to have been prompt in revamping or completely rebuilding distribution systems acquired in mediocre condition. The possibilities of positive danger to the public as well as interruptions to service resulting from poor transmission and distribution lines, have tended to make managements give due attention to maintenance as well as to construction. High-class construction

as regards sturdiness has been looked upon as a definite means of keeping down maintenance costs and therefore improving net earnings until near the end of the useful life of the equipment." Rep. F. T. C., 70th Cong., 1st Sess., Sen. Doc. 92, Part 72-A, 700.

Centralized Services Rendered by Holding Companies.

That centralized servicing presents distinct advantages which are present under holding company control and not otherwise, has been recognized by the Federal Trade Commission.

"Centralized servicing undertakes to furnish to one or more public utilities by means of one central organization certain services, as for example, management in any of its several forms, purchasing, financing, construction engineering, etc. As already pointed out, such a servicing organization may or may not be affiliated with the companies serviced. Centralized servicing, therefore, is not something peculiar to the industrial consolidation, although, as a matter of fact, independent servicing is increasingly of less importance than that furnished by an organization to its affiliates.

"There are several reasons suggested for this:

"(1) It is difficult for the owner to delegate to another, or for the other, a non-owner, to assume full executive responsibility when the risks of ownership and operation so largely remain with the owner, as they do under the service contract and fee system of management. Only the risk-bearing owner is in a position to formulate large policies or make quick and far-reaching decisions. The contract must necessarily prescribe, at least by implication, the limits of initiative and action which the 'manager' may exercise. Within these limits, only management of a routine nature will function, except as the two parties

to the contract are identified in interests as is true in the case of consolidation.

"(2) There are apparently not the same opportunities to secure low-cost capital through a servicing organization, related to the client company solely by a service contract, as there are through a servicing organization affiliated by ownership with a large group, of which the serviced company is also a member." Rep. F. T. C., 70th Cong., 1st Sess., Sen. Doc. 92, Part 72-A, 613.

"In the well-managed servicing groups the advantages in servicing due to the large volume of work and the great irregularity of occasions which required services combined with the advantages of salaries instead of fees for capable technicians, and the continuing intimate knowledge of operating-company conditions and requirements gained by a body of experts long associated therewith, have enabled that work to be cheaply and advantageously done." Rep. F. T. C., 70th Cong., 1st Sess., Sen. Doc. 92, Part 72-A, 839.

Financial Services Rendered by Holding Companies.

The Federal Trade Commission gave emphatic recognition to the fact that capital needs of utilities have presented difficult problems, which have, in turn, constituted one of the impelling forces leading to the growth of holding companies.

"Obtaining capital for new enterprises and extensions and betterments of existing small central stations in the amounts desired for their extremely rapid growth has generally been difficult. From the outset local managements generally have found it necessary to go to the great financial centers where, in some cases, they and their projects were not sufficiently well known to obtain the capital needed on the most favorable terms." Rep. F. T. C., 70th Cong., 1st Sess., Sen. Doc. 46, 166.

"Efficient public-utility service depends upon large and relatively permanent investments. The gross annual revenues are rarely, if ever, more than one-half the legitimate fixed-capital investment and frequently hardly equal one-fourth. The two necessities of command of capital for permanent investment and wisdom in the choice and arrangements of the facilities required demand for maximum success unusually large capital resources and technical skill." Rep. F. T. C., 70th Cong., 1st Sess., Sen. Doc. 92, Part 72-A, 834.

"Furnishing of this common-stock capital would seem normally to be the function of the local capitalists. But as such capital is not always available, the holding company has found an opportunity to acquire the control of the company and has furnished a part of the common-stock funds, reimbursing itself by selling its own securities to the public." Rep. F. T. C., 70th Cong., 1st Sess., Sen. Doc. 92, Part 72-A, 122.

It is not surprising, therefore, that financing is almost invariably named among the principal holding company advantages. In a summary of holding company advantages by the Federal Trade Commsision, the first one was:

"Better financing whereby money for improvements and expansions sometimes has been obtained at lower annual costs and easier terms, due to the broader field of operation and the larger volume of financing resulting from combining the capital requirements of a number of corporations." Rep. F. T. C., 70th Cong., 1st Sess., Sen. Doc. 92, Part 72-A, 838.

Another summary of holding company advantages by the same Commission commences:

"Funds were obtained from investors which promoted more rapid extension and improvement for

small or undeveloped operating utilities than would have in many cases been possible as independent units." Rep. F. T. C., 70th Cong., 1st Sess., Sen. Doc. 92, Part 72-A, 881.

Technical, Management and Engineering Services by Holding Companies.

The employment by holding companies of a high grade of experts for management and technical services has been clearly recognized as an advantage.

> "The chief advantages possible to operating companies, and thereby to the public through holding-company control and management, are the development of connected operations, the employment of larger and more efficient production plants with lower costs of production and larger volume of business, and the employment of more expert management for technical and business direction to reduce other costs and expenses." Rep. F. T. C., 70th Cong., 1st Sess., Sen. Doc. 92, Part 72-A, 834.

The second advantage of holding companies mentioned by the Federal Trade Commission in a summary of such advantages was the following:

> "Technical and managerial experts employed by some holding-company groups for construction, operation, planning, legal, and other functions. Their compensation, if on a fee basis for services rendered intermittently to numerous moderate and small-size organizations, needed to be large enough for expenses, unutilized time, prospecting for engagements, etc. Employed for a large group of operating companies, time could be more fully and gainfully occupied at less actual cost per project handled. The local managements could often benefit from the plans and advice of high-grade supervisors." Rep. F. T. C., 70th Cong., 1st Sess., Sen. Doc. 92, Part 72-A, 838.

In another summary of holding company advantages, the Commission named as the second and third the following:

> "• • • (2) combinations were hastened of smaller utility operations into one or more much larger organizations, which made possible the advantages of physical connection, large-scale production, and unified management; (3) skilled management and expert engineering were concentrated on the problems of plant construction, and of production, transmission, distribution, and utilization of electric energy • • •." Rep. F. T. C., 70th Cong., 1st Sess., Sen. Doc. 92, Part 72-A, 881.

The Federal Trade Commission expressed high praise for the quality of the technical and engineering achievements of holding company service organizations.

> "Engineers were encouraged by the better holding companies to construct and reconstruct splendid power stations, transmission lines, substations, and distribution systems with the object of gathering and properly caring for high volumes of business at the lowest possible operating costs, on the assumption that sooner or later the added capital outlays would earn a larger profit." Rep. F. T. C., 70th Cong., 1st Sess., Sen. Doc. 92, Part 72-A, 776.
>
> "Field inspections by Commission examiners have shown a character of design and construction under holding company staffs that almost invariably appeared efficient, durable and unextravagant. The most elaborate, and therefore relatively more expensive, constructions observed have been those authorized by independent companies and designed by nonaffiliated consulting engineers. The older Niagara Falls Power plants, the Chelan plant of the Washington Water Power Co., the Edgar plant of The Edison Electric Illuminating Co. of Boston, and the South Meadow plant of the Hartford Electric Light

Co. are examples of the latter. The work of the servicing and supervision staffs of several of the important holding company groups, according to the record, appears to have been efficiently and economically planned and accomplished, and a high order of progressive engineering appears to have been demonstrated therein. Whether the full measure of economies obtained was reflected in the operating company property records is another matter, depending upon the policies of the holding company managements. Neither is it to be inferred that such servicing organizations made no mistakes in planning for developments, in providing facilities or in establishing policies." Rep. F. T. C., 70th Cong., 1st Sess., Sen. Doc. 92, Part 72-A, 839.

Holding Companies Afford Advantageous Facilities for Centralized Purchases.

Among holding company economies mentioned by the Federal Trade Commission is the following:

"Centralized purchasing of a great variety of standardized appliances permits the pooling of such purchases for the entire group, with the maximum 'quantity discounts' obtainable for such resulting volume under holding company or large operating company contracts with the manufacturers; and where the holding company passes all of these quantity discounts on to the operating companies, such centralized purchasing benefits them and potentially the consuming public. Centralized purchasing of other materials and equipment also possibly obtains somewhat lower prices than would be obtained under decentralized purchasing, but the amount of such benefit cannot be measured. Centralization of the placement of insurance and the handling of claims in the hands of a specialist makes possible lower premiums and more favorable settlement of damage claims." Rep. F. T. C., 70th Cong., 1st Sess., Sen. Doc. 92, Part 72-A, 125-126.

Again, in listing a summary of holding company advantages the Commission included the following:

> "Better terms and conditions for purchase of equipment and supplies through large volume sometimes resulting from consolidating requirements of numerous operating companies and because of especially qualified and experienced buyers." Rep. F. T. C., 70th Cong., 1st Sess., Sen. Doc. 92, Part 72-A, 838.

Holding Company Management Makes Possible Rate Reductions and Extensions of Service to Sparsely Populated Areas.

A recognition that utility rates have been reduced and that holding companies have at least made possible such reductions is contained in the following quotation from the Federal Trade Commission Report:

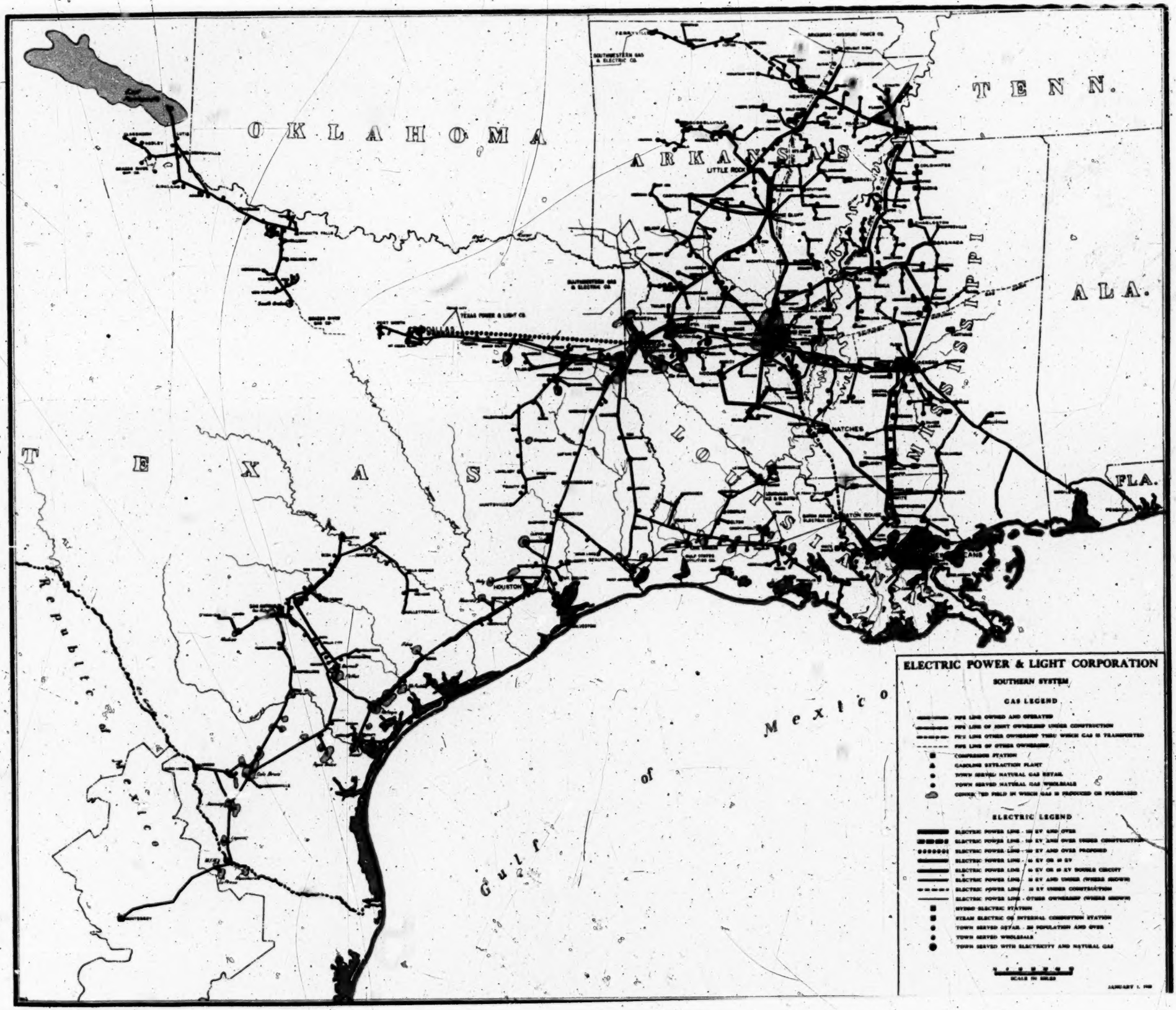
> "There has been a general decline (except for a period of about 4 years following the war) in electric rates, not only during the last 30 years, but also during the last decade. What part the holding companies can justly claim in this decline in rates of service it is impossible for anyone to determine, one reason being that certain practices of holding companies have tended to keep rates up. Improvements in the art would have brought about a general decline in any case, but apparently the holding companies hastened in many instances the introduction of more modern and efficient generating equipment and facilities for transmission by bringing together many independent and unconnected utility operations." Rep. F. T. C., 70th Cong., 1st Sess., Sen. Doc. 92, Part 72-A, 833.

The tendency toward rate reductions is also recognized in the following statement which constituted one of several advantages of holding companies as summarized by the Federal Trade Commission:

"• • • service was improved and extended, consumption increased, and costs of production were reduced, with a consequent possibility of, and tendency toward, lower rates, notwithstanding accompanying financial practices which had an opposite tendency as to rates; it was to the interest of the holding company to lower costs as a means of increasing its profit." Rep. F. T. C., 70th Cong., 1st Sess., Sen. Doc. 92, Part 72-A, 881.

That many areas, particularly backward ones, owe their present efficient electric service to holding companies was found to be the fact.

"The record shows vast gains in extended and enlarged service, improvements in facilities, reductions in costs, and reduction in rates under holding-company control in numerous areas previously served inadequately or not at all." Rep. F. T. C., 70th Cong., 1st Sess., Sen. Doc. 92, Part 72-A, 841.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Republic of Mexico
LITTLE ROCK
NATCHEZ
HOUSTON
TEXAS POWER & LIGHT CO.
SOUTHWESTERN GAS & ELECTRIC CO.
ELECTRIC POWER & LIGHT CORPORATION
SOUTHERN SYSTEM
GAS LEGEND
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. [redacted] 5

ELECTRIC POWER & LIGHT CORPORATION,

Petitioner,

against

SECURITIES AND EXCHANGE COMMISSION.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

REPLY BRIEF FOR PETITIONER ELECTRIC POWER & LIGHT CORPORATION.

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November 13, 1945.

Pandick Press, Inc., 27 Thames St., New York 6, N. Y., U. S. A.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

ELECTRIC POWER & LIGHT CORPORATION, Petitioner, *against* SECURITIES AND EXCHANGE COMMISSION.	No. 7

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

REPLY BRIEF FOR PETITIONER ELECTRIC POWER & LIGHT CORPORATION.

Introduction.

Basic to the position of the Commission before this Court, apart from questions of constitutional law and of the power of the Commission to dissolve holding companies, are two contentions with respect to the administration of Section 11 of the Public Utility Holding Company Act of 1935.

FIRST, the Commission is compelled to claim the right to disregard completely the status of particular holding companies and particular holding company systems under the Act whenever such holding companies and holding company systems are controlled by another holding company and are a part of another holding company system.

SECOND, the Commission is compelled to claim the right to disregard the integration requirements of Section 11(b)(1) so long as it purports to be acting under Section 11(b)(2).

Electric maintains that if either of these contentions which underlie the arguments of the Commission is erroneous, the order for the dissolution of Electric must fall. Electric also maintains that both these contentions with respect to the administration of Section 11 of the Act are entirely untenable.

In addition, despite sixteen pages of argument (Comm. Br., pp. 46-62), the findings of the Commission as to inequality of voting power, which are basic to the dissolution order, still rest upon figures which are derived from unsound guesses, assumptions and computations.

I.

The Commission's disregard of Electric's status under Section 11.

Electric set forth in its main brief the plain fact that Section 11 imposes upon the Commission certain duties with respect to *each* and *every* registered holding company and holding company system. Electric is a registered holding company, owning a holding company system, and the Act makes no distinction between one holding company and another.

It is true that Electric is a part of the Bond and Share holding company system, which did not at the time of the hearings in this proceeding comply with Section 11. However, unless Section 11 compels the Commission to dissolve all holding companies in a large and scattered holding com-

pany system, or unless Section 11 has nothing whatever to guide the Commission, the requirements of Section 11 with respect to the integration and simplification of *each* and *every* holding company and holding company system must import a duty on the part of the Commission with respect to Electric as well as with respect to Bond and Share.

The Commission comments upon these matters in the following manner:

> "Thus, while it is proper to refer to the American and Electric systems as separate holding company systems, the Bond and Share system includes both the American and Electric systems as well as the systems of other subsidiary holding companies. Likewise, the term security holders of the Bond and Share system includes holders of securities in petitioners and their operating subsidiaries as well as security holders in Bond and Share. Statements in the briefs of petitioners evidence a correct understanding of this distinction, e. g. Amer. Br., pp. 7, 17, 93, 115, Elec. Br., p. 5. Nevertheless it is elsewhere incorrectly stated that the issues included solely the effect of or position of petitioners in the Bond and Share system and not their position or effect within their own systems (Amer. Br., p. 9; Elec. Br., p. 35). *The implication is that the Commission could not consider the impact of their corporate structure and existence upon security holders of petitioners, or of petitioners' subsidiaries. This seems largely a play on words.*"* (Comm. Br., pp. 18-19).

Electric did not argue that the Commission "could not consider the impact" of Electric's corporate structure and existence upon its security holders and those of its subsidiaries. Electric argued, and the fact is, that the proceed-

* Emphasis in quotations added, unless otherwise noted.

ing was not directed to a consideration of that "impact"; nor was that the basis of the dissolution order.*

The Commission could, of course, "consider the impact" of Electric's corporate structure and existence upon its security holders and upon the security holders of its subsidiaries. But it is absurd to contend, assuming the Commission to be "considering" Electric and Electric's system, that Electric's system can be said to be simplified and integrated by dissolving Electric.

Indeed, the Commission is apparently aware of the fallacy of its position. The Commission repeatedly protests that no harm can come from the dissolution order, since the Commission may lift the order of dissolution at some future time provided Electric has meanwhile simplified and integrated itself. (Comm. Br., pp. 31, 102, 133-134).

Electric's contention, however, was that if there are conditions upon which Electric may continue to exist, responsible administration required that the Commission order those conditions to be fulfilled. That was its job. Its job was not to order dissolution and then facilitate or not, as it desires, the accomplishment of the ultimate objectives of the Act.

A reading of the Commission's brief only buttresses the conclusion reached after reading its findings and opinion, that the dissolution order is not based upon the effect of the continued existence of Electric upon its own system. The Commission's ultimate justification for the dissolution of Electric inevitably returns at every point, in its

* Indeed, at no point either in the Commission's findings and opinion, in its briefs below, in the court's opinion below, or in the Commission's brief before this Court has the case respecting Electric alone under Section 11(b)(2) been clearly stated—even without regard to the coordinate provisions of Section 11(b)(1). Facts regarding companies throughout the Bond and Share system have always been intermingled with facts respecting Electric as support for action by the Commission against Electric or conclusions respecting it.

brief as well as in its opinion, to the fact that Electric is an intermediate holding company in the Bond and Share system and is being dissolved to remedy defects in that system, not in Electric's.

The mere fact that a holding company and a holding company system are a part of another holding company system is not *per se* ground for dissolution. The insistence of the Commission that it may dissolve Electric simply because it has a "pyramiding" effect in another holding company system is in clear contravention of the provisions of Section 11 imposing the same duty upon the Commission with respect to the simplification and the integration of *each* holding company system.*

In its main brief (pp. 31-33, 43-44), Electric pointed to the severance of Bond and Share control of Electric as the remedy most closely related to the evils alleged in the Commission's findings, and as a complete and direct remedy for those evils. Electric argued that the existence of so direct and complete a remedy disclosed how arbitrary and unreasonable the dissolution of Electric is as a cure for the evils which are charged against Bond and Share.**

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* The Commission's brief (f. n., pp. 17-18) asserts that the narrowing of the issues to the sole question of whether or not Electric should be dissolved was "in response to respondents' objections". The inference that the respondents sought such a narrow issue is contrary to the fact (R., Vol. I, 57-66).

Moreover, the court below was in error in stating (R., Vol. IV, 874-n) that despite such narrowing of the issues, Electric could still present and have considered any relevant matters under Section 11(b)(2). The Commission in its June 7th order, by which the issues were narrowed, specifically reserved all other issues set forth in the order calling the hearing (R., Vol. I, 27, 50, 66). The issues reserved included everything under Section 11(b)(2) except dissolution alone.

** Incidentally, the Commission neglects to state, when it quotes at length from the Bond and Share plans of July 25, 1945 (Comm. Br., pp. 118-123), that one of the steps therein provided for is the severance of Bond and Share's control of Electric.

Nowhere in the Commission's brief does it answer the foregoing argument. It states that the severance of Bond and Share control would have presented difficulties, and the difficulty most relied on, is stated to relate.

> "to appraising the value of Bond and Share's holdings of petitioners' common stock, either for purposes of a fair and equitable plan of distribution among its stockholders or for passing on a sale price." (Comm. Br., p. 126).

Elsewhere, however, the Commission had already stated that in passing upon sales prices for securities, the Commission has limited its regulatory functions

> "to insistence upon arms' length dealings and adequate disclosure to possible purchasers, and has not prevented the vendor holding companies from realizing the sums substantially in excess of book value when obtainable." (Comm. Br., p. 59).

But if we assume that the first quotation above is the one which the Commission really means, it still constitutes no reply to Electric's argument. Electric's argument was directed to the relationship between the evils to be remedied, the person responsible for those evils, the remedy to be applied, and the person to whom the remedy is applicable. The Commission's argument is directed to the different question of difficulty of administration.

Moreover, and again assuming that the first quotation above is the one which the Commission really means, the difficulties of bringing Electric's system into conformity with the standards of Section 11 so that Bond and Share's control may be severed, are substantially the same as the difficulties of bringing Electric's system into conformity with the standards of Section 11 for dissolution and distribution purposes.

II.

The Commission's disregard of Section 11(b)(1).

At no point in its brief does the Commission indicate a recognition of the affirmative mandate of Section 11(b)(1) with respect to integration. It certainly does not purport to be integrating the Bond and Share system, and it flatly denies any duty to integrate the Electric system, at least through Electric.

As in its opinion, so in its brief, the Commission disposes of the integration of Electric's southern system, without any hearing, in terms of doubt and conjecture as to whether Electric is entitled to retain that system.* (Comm. Br., pp. 30-31, 130-2).

Moreover, the brief of the Commission is plainly misleading in so far as Electric is concerned, when it says:

> "Further evidence that the subholding companies were not designed to coordinate or supervise the activities of their operating company subsidiaries is found in their geographic grouping. An examination of Appendices B and C attached to this brief shows that American's subsidiaries are scattered from Florida to Washington and from Minnesota to Texas. Those of Electric are similarly dispersed from Mississippi to Oregon. *From an operational point of view no conceivable plan for coordination can be found in the grouping of these companies*

* Contrary to the statement at page 131-n of the Commission's brief, a "careful reading" of Electric's main brief indicates that it *has* abandoned its contention that the United Gas properties may be retained with its southern system. Indeed, on November 6, 1945, Electric filed with the Commission a plan for distributing its holdings of United Gas stock to Electric's preferred stockholders.

> *under their subholding companies,* and, as we have seen, their actual management ignores these lines." (Comm. Br., pp. 85-86).

The italicized portion of the foregoing quotation cannot possibly apply to Electric's southern system. An examination of the map constituting Appendix B to the Commission's brief or of the map constituting Appendix C to Electric's main brief discloses that Electric is a holding company holding together what is at least an interconnected system and *prima facie* an integrated system.*

Much of the Commission's discussion with respect to Electric's right to retain its southern electric system is directed to the argument that Electric has not performed any "functions" with respect to that system in the past. Electric contends that past activities are irrelevant to the integrating and simplifying tasks of the Commission under Section 11(b)(1), as the Commission itself agrees:

> "* * * our examination of the record convinces us that claims of past benefits have not been established *or are irrelevant* * * *." (R., Vol. II, 612)

Moreover, it is to be expected that so long as Electric's subsidiaries are in the Bond and Share system, most holding company functions would be performed by Bond and Share. Section 11(b)(1), however, must contemplate changes in the specific functions of particular holding companies as their systems are integrated by the Commission.

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* Compare the statement at page 132 of the Commission's brief with respect to the investment of Electric in its four electric subsidiaries comprising its southern system:

> "Since the Commission did not pass upon these questions, it was not inconceivable, at least in the case of Electric, that petitioners might ultimately be transformed into appropriate corporate vehicles for holding under common control integrated public utility systems."

The question is not what holding company functions Electric has performed in the past, but instead what holding company functions it will perform in the future with respect to the integrated system which it may be permitted to retain. It is sufficient to establish Electric's status under Section 11(b)(1) that Electric does own an interconnected electric system which is, or is at least capable of being, fully integrated, and that Electric is preponderantly owned by the public.

If the Commission may completely disregard the provisions of Section 11(b)(1) merely by claiming to act pursuant to Section 11(b)(2), Section 11(b)(1) may be rendered a nullity. As set forth in Electric's main brief, the requirements of Section 11(b)(1) and the requirements of Section 11(b)(2) are coordinate, and simplification to the point of making integration impossible through the medium of existing holding companies is to deprive those holding companies of rights clearly accorded them in the statute. Electric's right to retain an integrated public utility holding company system can hardly be disposed of on the mere assertion by the Commission that Electric has not been demonstrated, without a hearing, to be "superior" to a new holding company formed for the purpose of integrating its southern system. (Comm. Br., p. 31).

The Commission contends that Electric's argument with respect to the coordinate purposes of Sections 11(b)(1) and 11(b)(2) can be reduced to the contention that dissolution can never be ordered under Section 11.* Electric made no

* "Petitioner's contention that the Commission must try to find an integrated system or combination thereof for each existing holding company in a holding company system is only another way of arguing that dissolution of a useless holding company is never permissible." (Comm. Br., p. 136).

such contention, and specifically so stated. (Electric Br., pp. 2, 12). The Commission's brief, however, can, indeed, be reduced to the converse contention, namely, that Section 11 authorizes the Commission, at its mere whim, to dissolve virtually all holding companies.* Any such construction of Section 11(b)(2) is clearly untenable.

The Commission's brief also disparages the plan filed by Electric, in the same terms used in the findings and opinion. Even the brief, however, does not contend that the plan is frivolous. Indeed, an examination of the plan (R., Vol. II, 487) shows that it provides for action far too drastic with respect to both the properties and the securities of Electric to be termed frivolous. The fact that all questions under both Sections 11(b)(1) and 11(b)(2) were not fully provided for in the plan must be considered in connection with the time when the plan was prepared and filed. In 1941, most of the reorganization problems which have since been settled, at least so far as the Commission is concerned, and to some extent by the courts, were then completely unresolved.

The plan was prepared and filed in good faith for the purpose of bringing Electric and its system into conformity with the integration and corporate simplification provisions of Section 11. Electric made a good faith effort to secure a hearing on the plan by moving for the consolidation of the plan proceedings with what had by then become known as the "dissolution proceedings." If the plan has not become effective, that is due to the fact that the Commission denied the consolidation motion and entered a

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* "The process of simplification may well result in the elimination of all existing holding companies in a system because a new company is more suitable for the purpose of holding the system together than any of the existing holding companies." (Comm. Br., p. 136).

dissolution order instead, and not because of any inherent weakness in the plan itself.*

The attempt in the Commission's brief (p. 32) to infer that this plan for full compliance with Section 11 by Electric was "merely litigation strategy" and to bolster this assertion by referring to subsequent action on the part of Electric to bring it into conformity with the provisions of Section 11 (Comm. Br., pp. 32, 140), is entirely without foundation.

III.

The Commission's entanglement in its own figures.

The Commission is at great pains in its brief (pp. 46-62) to attempt to extricate itself from the difficulties which result from the inaccuracies and guess-work underlying the figures on which it bases its dissolution order.

Electric's argument was to this effect (Electric Br., pp. 39-42): the Commission's conclusion that "the continued existence and capital structure of Electric unfairly and inequitably distribute voting power among security holders of the Bond and Share system" was based (*a*) upon a finding that voting power was unfairly and inequitably distributed among the security holders of the Electric system, and (*b*) upon a finding that voting power was unfairly and in-

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* The court below referred to Electric's plan as having been "tardily filed" (R., Vol. IV, 879). This is an unfair statement, particularly in view of the fact that the Commission did not conclude the dissolution proceedings or deny the motion to consolidate the plan proceedings with the dissolution proceedings until 8½ months after the plan was filed and the motion made. Whether or not this 8½ months' delay on the part of the Commission was pursuant to an understanding with counsel for Electric, as asserted by the Commission (Comm. Br., p. 137-n), is not relevant to the question of whether the plan was "tardily" filed.

equitably distributed among the security holders of the Bond and Share system, including Electric (R., Vol. II, 624). The conclusion was expressly based upon *both* of these findings.

These findings in turn were based upon "the foregoing figures"—which include an interest of Electric in its subsidiaries equal to 39%, "adjusted" to 32%, and further "adjusted" to 15.65% (R., Vol. II, 622-624). The findings were expressly based upon *all* these figures.

We do not argue, as the Commission says, that the opinion is based "solely" on the 15% figure. (Comm. Br., pp. 47-48). We do point out that the Commission itself based its decision on all three of the "foregoing figures." And we point out in addition that the 39% and the 32% figures give the Commission no real support for its decision. It has uniformly and without discussion accepted a 25% common stock equity as a sufficient investment to support voting control. The following are decisions supporting the 25% investment, which have come down in recent weeks:

Matter of Northern Indiana Public Service Company, SEC Holding Company Act Release No. 6149, p. 3, footnote 2 (October 22, 1945);

Matter of Pennsylvania Power Company, SEC Holding Company Act Release No. 6140, pp. 6-7 (October 17, 1945);

Matter of Union Electric Company of Missouri, SEC Holding Company Act Release No. 6134, p. 9 (October 16, 1945);

Matter of Columbia Gas & Electric Corporation, SEC Holding Company Act Release No. 6132, p. 7 (October 15, 1945);

Matter of Florida Power Corporation, SEC Holding Company Act Release No. 6124, p. 14 (October 11, 1945).

The Commission says that it placed greatest emphasis on the figures before adjustment for write-ups and depreciation because, it states, "those are the figures mentioned immediately before the Commission's conclusion that 'on the basis of the foregoing figures,' voting power was unfairly and inequitably distributed." (Comm. Br., p. 48). Aside from the fact that the last figure regarding Electric's investment in its subsidiaries, prior to the phrase "on the basis of the foregoing figures," is the 15% fully "adjusted" equity, the fact is that nothing in the decision of the Commission indicates that it relied upon one set of figures any more than another.

The Commission says that it was not dealing in assumptions and guesses with respect to these figures. (Comm. Br., p. 56). The very language of the Commission's opinion (R., Vol. II, 623), however, refutes this. There is no conclusive or definitive language on the entire page where the figures are dealt with. The language used is: "apparent system write-up," "it appears," "indicates," "may be necessary," "probable," "for present purposes," "would represent," etc. And indeed, further on in the opinion (*id.* 646) the Commission discloses its then state of mind concerning the entire question, by stating that

> "there likewise exist *substantial questions* as to the equity of American and Electric in many of the subsidiaries which they claim as important parts of their systems; *if it should later be determined* that little or no equity exists in certain such companies, they of course would not be retainable apart from the standards of Section 11(b)(1)."

The Commission's arithmetical error in treating an alleged zero as though it were a negative figure of $28,000,000 (Electric Br., p. 42) is not explained away by the foot-

note in the Commission's brief (pp. 53-54). Whether the addition of a column of figures is for the purpose of determining "system investment," "equity evaluation" or plain grammar-school arithmetic, a zero does not become a negative figure.

The unusual character of these basic figures in the Commission's decision can only be explained as the result of its zealous search for what it terms "the smallest possible equity of Electric in the capitalization of its subsidiaries" (R., Vol. II, 623).*

The figures cited to the Court at pages 39 to 42 of Electric's main brief, representing the actual determinations by the Commission with respect to Electric's investment in certain of its subsidiaries, still stand.** The Commission's

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* The Commission's brief seeks to imply that Electric failed to object to the figures in Appendix F-2 to the Commission's opinion and that these figures constitute part of an agreed statement of facts upon which the case comes up. (Comm. Br., pp. 35-36, 56). Actually, Electric did object most strenuously to the figures now complained of, in conference with the staff. Aside from that, however, the figures in question do not purport to be "findings." The point for review here is not whether the figures are correct assumptions or guesses; but whether the Commission may base its decision upon assumptions and guesses. Electric reserved its right to full review of any such questions (R., Vol. II, 522).

** A further example of the inaccuracy of the Commission's findings with respect to Electric's investment in its subsidiaries is furnished by a decision of the Commission which has come down since Electric filed its main brief. Electric's investment in Dallas Power & Light Company is shown in Appendix F-2 to the Commission's opinion (R., Vol. II, 667) at a book figure of $5,652,000. This is "adjusted" downward first to $4,686,000 and then to only $533,752. Yet this investment—which on the Commission's dissolution findings is presumably almost all water—was recently sold *to an affiliate* with the Commission's approval for $17,350,000. *Matter of American Power & Light Company, Texas Utilities Company and Electric Power & Light Corporation*, SEC Holding Company Act Release No. 6158 (October 24, 1945).

For the Court's assistance, we recapitulate in Appendix A to this brief the "findings" in Column (13) of Appendix F-2 and compare them with the Commission's subsequent definitive determinations.

brief has not succeeded in explaining away its error in computing Electric's investment in its subsidiaries, and the error is fatal to the order for the dissolution of Electric.

Conclusion.

The order of the United States Circuit Court of Appeals for the First Circuit should be reversed, with directions that the orders of the Securities and Exchange Commission issued August 22 and August 28, 1942, be set aside.

Respectfully submitted,

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November 13, 1945.

Appendix A.

Tabulation showing disparity between the findings upon which the dissolution order is based and subsequent definitive determinations with respect to 6 out of 11 subsidiaries of Electric which are shown in Appendix F-2 and as to which the comparisons are possible.

	Electric's equity in its subsidiaries as shown in Column (12) of Appendix F-2	Commission's definitive determination of Electric's equity in its subsidiaries or approved sale price of such equity
Dallas Power & Light	$ 533,752	$ 17,350,000*
Idaho Power Company	5,603,794	9,929,000
Louisiana Power & Light	181,841	6,815,000
Mississippi Power & Light	114,999	2,500,000
United Gas Corporation	60,460,109	101,081,010
Utah Power & Light	(*28,059,794*)†	—
Totals	$38,834,701	$137,675,010

* Approved sale price.

† Improperly treated as algebraic negative figure. See Electric's main brief, p. 42.

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SECURITIES AND EXCHANGE COMMISSION.

ON WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF ON BEHALF OF HOLDERS OF PREFERRED STOCK OF ELECTRIC POWER & LIGHT CORPORATION, *AMICUS CURIAE.*

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AUTHORITY CITED:

Public Utility Holding Company Act, Sec. 11-b.....3, 5, 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 7.

ELECTRIC POWER & LIGHT CORPORATION,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION.

ON WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF ON BEHALF OF HOLDERS OF PREFERRED STOCK OF ELECTRIC POWER & LIGHT CORPORATION, *AMICUS CURIAE.*

Authority for Submission.

This brief is filed on behalf of holders of 42,344 shares of Preferred Stock of Electric Power & Light Corporation (a list of whose names and the extent of whose holdings appear in Appendix "A") as *amicus curiae*, pursuant to Rule XXVII, Paragraph 9. The written consents of all parties hereto have been filed with the Court.

Scope of This Brief.

The purpose of this brief is twofold: (1) to identify the interests involved in this litigation and (2) to demonstrate, by a brief statement of the plight of the preferred shareholders of petitioner, Electric Power & Light Cor-

poration (hereinafter called "Electric"), the need and justification for the statute and the order of the Securities and Exchange Commission (hereinafter called "Commission") here appealed from.

ARGUMENT.

I.

The identity of the interests here involved.

The Commission appears primarily in the national interest, the interests of public investors and of public consumers. Presumably, the petitioner Electric appears on behalf of its investors, preferred and common stockholders alike. But the fact is that petitioner Electric is controlled by a management selected and elected by its common stockholder, Electric Bond and Share Company (hereinafter called "Bond and Share"), and the interests of the petitioner Electric's preferred shareholders and its common stockholder, Bond and Share, are diverse and adverse. In consequence, the petitioner Electric here voices and seeks to further the Bond and Share interest, leaving the adverse and predominant preferred stock interest unrepresented, except as it is included in the general representation by the Commission.

Electric has been maintained as a legal device to enable Bond and Share to exercise control of a number of utility operating companies, with a minimum of investment—or no investment at all—on the part of Bond and Share. One of the customary facets of this device is the sub-holding company, the petitioner Electric.

Of Electric's* total capitalization of $192,189,868, Bond and Share owns securities which have stated or liquidating values, including surplus of $17,558,108.

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* Under the limitations of the record we use June 30, 1942 figures.

The subordinate common stock interest in the total capitalization casts 3,454,689 votes for directors of Electric as compared with 769,590 votes cast by the predominant majority public preferred stock investment, and of the controlling common stock vote Bond and Share casts 57.3% of the votes. In consequence, Bond and Share, with a subordinate 9.14% of the total investment, selects and elects the entire Board of Directors of Electric and holds the power to supplant annually non-acquiescent directors.

Since 1935, although the necessary Governmental mandate (Sec. 11-b of the Public Utility Holding Company Act) requiring the SEC to compel an equitable redistribution of the vote has been in force, the minority common stock interest, through its vestigial power to select and elect directors, has been able to deny the preponderant preferred stock investment the control sought to be secured it by the statute. By this anachronistic legal device, Bond and Share, through its selected and elected Electric management, has been able to resist the application of the statute in the courts and by resisting the application of the statute in the courts, has been able to continue its illegal control. And, to complete this bootstrap process, the minority-selected-and-elected directors, with no apparent recognition of the violation of the fiduciary obligation thereby entailed, have undertaken to appear and speak in this proceeding for the majority preferred stock interest it has been engaged in subordinating and exploiting.

II.

The decree, if executed, will restore the property interests of the stockholders and destroy only the illegal power of the holding corporation.

By the order here appealed from, the Commission seeks to enforce the expressed will of Congress. The plight of petitioner Electric's preferred shareholders demonstrates the need for the statute, the need for its grant of powers to the Commission, the need for their exercise, and documents the Commission's determination that dissolution of petitioner Electric is necessary to protect the legal and financial rights of the preferred shareholders.

Here, we find a complicated legal structure of holding and sub-holding companies, necessary only to enable a 9.14% subordinate minority to control a $140,000,000 prior public investment and to deny the public investors any voice in its management and control. Such unnecessary complications in the corporate structure have enabled the minority to violate its preferred stock contract, in substance and in spirit, by non-payment of dividends and to continue such violations for a decade after Congress, in consideration of the widespread fraud that attended the adoption and execution of such contracts, had decreed that public investors should be freed from their inequities.

These unnecessary legal corporate complications have given the subordinate minority the unrestricted privilege of managing and controlling the underlying physical properties acquired through the use of the funds of the voiceless public investors, to receive their net earnings and to withhold them (as has here been done by the non-payment of preferred stock dividends), from the true owners of the property. Whether the subsidiary or the parent holds cash beyond its or their needs, whether the subsidiary pays excess earnings to the parent as divi-

dends, whether the parent, in turn, holds or disburses such receipts, rests wholly in the arbitrary power of the subordinate minority. The owners of the underlying properties are at least twice removed from their investments and have no vestige of their control.

The failure—however arbitrary—to pay preferred stock dividends carries with it none too apparent implications. Unpaid dividends of over five million dollars a year, year after year, carry no penalties upon the minority for non-payment, bear no interest to the majority as compensation for the consequent loss. But in the hands of the corporation and controlled by its subordinate minority, the unpaid funds are available to build a theretofore non-existent equity into a substantial majority investment.

During the past years, Electric has received the earnings of its underlying physical properties, but, with rare exception, has paid no dividends. The effect on the common stock equity is reflected in the market price of the common stock which has risen from a low of 1¼ in 1943* to a present market of 18** while the preferred stock sells at less than the principal amount and the unpaid dividends thereon.**

The ending of these abuses—these injustices—here demonstrated by the record—was the purpose of the Public Utility Holding Company Act. The need of ending them—by the destruction of the corporate complications which engender and harbor them—is not subject to cavil. That the management designated by the subordinate minority, which through them exploits the preponderant majority, will not urge their abolition is obvious. That only the Commission can and will do so is equally manifest. And, finally, that dissolution of the petitioner Electric is the only adequate means of effecting the needed result is clear.

The existence of petitioner Electric is the complication in this case at which the Public Utility Holding Company Act is aimed. The corporation not only serves no useful

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* N. Y. Times, Jan. 3, 1944.

** Wall Street Journal, Oct. 31, 1945.

purpose but it constitutes the very barrier—the legal complication aimed at by the Public Utility Holding Company Act—that stands between the preferred shareholders, the public owners of the underlying assets, and the incidents of that ownership. The control of the preferred shareholders should be exercised directly upon the fruits of their investment. That can be done only by putting the share certificates that directly represent such ownership into the hands of the preferred shareholders, by dissolution of the holding company and distribution of the shares of stock of the subsidiaries. The control of the earnings of the owned assets, their retention and disbursement, will follow the possession of the share certificates. The elimination of the legal complications that convert 91% ownership into zero control requires elimination of the intermediate petitioner, Electric, for it and it alone constitutes the barrier between ownership and control.

This barrier is detrimental not only to the preferred stockholder but also to the publicly held common stock. Present distribution of the assets of Electric will give the common stockholders direct control of their proportionate interest. Control so separated is of far greater value than the present subordinate interest in Electric which is subject to current market fluctuations and will be the first to be dissipated in the event of a market decline. Bond and Share, by reason of the perquisites of management and control alone is interested in the continued existence of Electric. This interest is peculiar to it and conflicts with the interests and rights of the preferred stock and the publicly held common stock alike. It is the latter interest which alone is entitled to recognition and support.

These facts demonstrate that the contention of Bond and Share, speaking through the voice of its controlled Electric management, that the present statute would result in a deprivation of property without due process, is without foundation.

The impact of the present statute on the true owners of Electric will be to *restore* the benefits and incidents of property rights to those to whom they rightfully belong. The sole deprivation is the termination of the power of this minority to continue to deny the true owners of their right of control and of their right to enjoy the fruits of their investment. The statute is not a deprivation—it is an essential means of restoring the incidents of property rights, without which the term "property" is a mere euphemism.

CONCLUSION.

The decision and decree of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX "A".

Name of Holder	Class of Shares and Amount $7 Preferred	$6 Preferred
Percival E. Jackson	1,600	
Irma W. Jackson	800	
Muriel J. Bryer	400	
Joseph J. Bryer	100	
Harvey S. and Seely G. Mudd	9,850*	9,900*
Selected American Shares, Inc.		5,000
Atlantic Life Insurance Company	1,200	
Arthur D. Dana, Jr.	1,500	
Alice A. Dana	800	
William D. Dana	400	
Burton, Cluett & Dana on the instruction of various holders	1,750	300
Investment Corporation of Philadelphia	800*	
Theodore H. Price, Jr.	1,144*	200*
L. F. Rothschild & Co. on the instruction of various holders	1,700	
William M. Greve	1,000	
Mary Greve	800	
John Vanneck	300	700
Philip Hofer	600	
Florence Gates Judd	500	
George A. Gaston	300	300
Philip Corbin	200	
Hans Freund	200	
	25,944	16,400
Total	42,344	

* This stock stands in the name of various nominees.

SUPREME COURT OF THE UNITED STATES

Nos. 4 and 5.—October Term, 1946.

American Power & Light Company, Petitioner, v. Securities and Exchange Commission.	On Writs of Certiorari to the United States Circuit Court of Appeals for the First Circuit.
Electric Power & Light Corporation, Petitioner, v. Securities and Exchange Commission.	

[November 25, 1946.]

Mr. Justice Murphy delivered the opinion of the Court.

We are concerned here with the constitutionality of § 11 (b) (2) of the Public Utility Holding Company Act of 1935[1] and its application to the petitioners, the American Power & Light Company and the Electric Power & Light Corporation.

American and Electric are two of the subholding companies in the Electric Bond and Share Company holding company system, certain aspects of which were considered by this Court in *Electric Bond & Share Co.* v. *S. E. C.*, 303 U. S. 419. This system is a pyramid-like structure of which Bond and Share itself constitutes the apex, five subholding companies (including American and Electric) create an intermediate tier,[2] and approximately 237 direct and indirect subsidiaries of the latter form the base.

[1] 49 Stat. 803, 821; 15 U. S. C. § 79k (b) (2).

[2] The other three subholding companies are the American & Foreign Power Company, Inc., the National Power & Light Company and the American Gas & Electric Company. Bond and Share also has a wholly-owned service subsidiary, Ebasco Services Incorporated. The organizational set-up is more fully explained in the Commission's opinion in this proceeding, 11 S. E. C. 1146, and in In re Electric Bond and Share Company, 9 S. E. C. 978.

From the standpoint of book capitalization and assets, number of customers and areas served by the operating companies, and quantity of electricity generated and gas sold, the Bond and Share system constitutes the largest single public utility holding company system registered under the Act.

The proceeding now under review was instituted by the Securities and Exchange Commission under § 11 (b) (2) of the Act. After appropriate notice and hearing, the Commission found that the corporate structure and continued existence of American and Electric unduly and unnecessarily complicated the Bond and Share system and unfairly and inequitably distributed voting power among the security holders of that system, in violation of the standards of § 11 (b) (2). 11 S. E. C. 1146. Orders were accordingly entered requiring the dissolution of both American and Electric and requiring them to submit plans for the effectuation of these orders. The First Circuit Court of Appeals sustained the Commission's action in all respects and affirmed its orders, while refusing to consider certain contentions of American and Electric which had not been raised before the Commission. 141 F. 2d 606. We granted certiorari because of the obvious public importance of the issues presented. 325 U. S. 846.

I.

At the outset, we reject the claim that § 11 (b) (2), viewed from the standpoint of the commerce clause, is unconstitutional.

So far as here pertinent,[3] § 11 (b) (2) directs the Securities and Exchange Commission, as soon as practicable

[3] The so-called "great-grandfather clause" of § 11 (b) (2) is not involved in this case. That provides that "In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Com-

after January 1, 1938, "To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. . . . Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company."

Like § 11 (b) (1), its statutory companion, § 11 (b) (2) applies only to registered holding companies and their subsidiaries. We noted in *North American Co.* v. *S. E. C.*, 327 U. S. 686, that by making certain interstate transactions unlawful unless a holding company registers with the Commission, § 4 (a), and by extending § 11 (b) (1) to registered holding companies, Congress has effectively applied § 11 (b) (1) to those holding companies that are in fact in the stream of interstate activity or that affect commerce in more states than one. The identical observations can be made as to § 11 (b) (2). Its impact is likewise limited, by reference to the registration requirements, to those holding companies which depend for their very existence upon the constant and systematic use of the mails and the instrumentalities of interstate commerce.

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mission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company." See *Otis & Co.* v. *S. E. C.*, 323 U. S. 624.

Effect is thereby given to the legislative policy set forth in § 1 (c) of interpreting all provisions of the Act to meet the problems and to eliminate the evils "connected with public-utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce."

The Bond and Share system, including American and Electric, possesses an undeniable interstate character which makes it properly subject, from the statutory standpoint, to the provisions of § 11 (b) (2). This vast system embraces utility properties in no fewer than 32 states, from New Jersey to Oregon and from Minnesota to Florida, as well as in 12 foreign countries. Bond and Share dominates and controls this system from its headquarters in New York City.[4] As was the situation in the *North American* case, the proper control and functioning of such an extensive multi-state network of corporations necessitates continuous and substantial use of the mails and the instrumentalities of interstate commerce. Only in that way can Bond and Share, or its subholding companies or service subsidiary, market and distribute securities, control and influence the various operating companies, negotiate inter-system loans, acquire or exchange property, perform

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[4] The Commission found that "This control of the subholding companies by Bond and Share is not limited in operation to the mere casting of a certain percentage of votes at stockholders' meetings. It permeates every stratum and unit of the holding company system in the most comprehensive manner. . . . Through the concentrated voting power of the securities owned by Bond and Share, it is able to elect the directors of the subholding companies, and thus govern selection of the respective managements. Through the managements of the subholding companies it is able to govern selection of the directors and managements of each of the operating company subsidiaries of each of the subholding companies. The latter are in turn responsive to Bond and Share's wishes respecting entry into service contracts with Ebasco Services Incorporated, and the details of the operations of their companies." 11 S. E. C. at 1203–04.

service contracts, or reap the benefits of stock ownership. See § 1(a). See also *International Textbook Co.* v. *Pigg*, 217 U. S. 91. Moreover, many of the operating companies on the lower echelon sell and transmit electric energy or gas in interstate commerce to an extent that cannot be described as spasmodic or insignificant. *Electric Bond & Share Co.* v. *S. E. C., supra*, 432–33.[5] Such activities serve to augment the interstate nature of the Bond and Share system. And they make even plainer the fact that this system falls within the intended scope of § 11 (b) (2).

Congress, of course, has undoubted power under the commerce clause to impose relevant conditions and requirements on those who use the channels of interstate commerce so that those channels will not be conduits for promoting or perpetuating economic evils. *North American Co.* v. *S. E. C., supra*; *United States* v. *Darby*, 312 U. S. 100; *Brooks* v. *United States*, 267 U. S. 432. Thus to the extent that corporate business is transacted through such channels, affecting commerce in more states than one, Congress may act directly with respect to that business to protect what it conceives to be the national welfare. It may prescribe appropriate regulations and determine the conditions under which that business may be pursued.[6] It may compel changes in the voting rights and other privileges of stockholders.[7] It may order the divestment or

[5] The record before this Court in the *Bond and Share* case revealed that more than 31% of the total electric energy generated by Bond and Share subsidiaries is transmitted across state lines, while more than 25% of all the electric energy transmitted across state lines in the United States is handled by Bond and Share companies. Approximately 47% of the gas handled by Bond and Share companies is transported across state lines, this amount constituting more than 20% of all the gas transported across state lines in the United States.

[6] *United States* v. *Darby*, 312 U. S. 100; *Electric Bond & Share Co.* v. *S. E. C.*, 303 U. S. 419.

[7] *Northern Securities Co.* v. *United States*, 193 U. S. 197; *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106.

rearrangement of properties.[8] It may order the reorganization or dissolution of corporations.[9] In short, Congress is completely uninhibited by the commerce clause in selecting the means considered necessary for bringing about the desired conditions in the channels of interstate commerce. Any limitations are to be found in other sections of the Constitution. *Gibbons* v. *Ogden*, 9 Wheat. 1, 196.

Since the mandates of § 11 (b) (2) are directed solely to public utility holding company systems that use the channels of interstate commerce, the validity of that section under the commerce clause becomes apparent. It is designed to prevent the use of those channels to propagate and disseminate the evils which had been found to flow from unduly complicated systems and from inequitable distributions of voting power among security holders of the systems. Such evils are so inextricably entwined around the interstate business of the holding company systems as to present no serious question as to the power of Congress under the commerce clause to eradicate them.

In the extensive studies which preceded the passage of the Public Utility Holding Company Act, it had been found that "The most distinctive characteristic, and perhaps the most serious defect of the present holding-company organization is the pyramided structure which is found in all of the important holding-company groups examined." [10] The pyramiding device in its most common

[8] *North American Co.* v. *S. E. C.*, 327 U. S. 686.

[9] *Northern Securities Co.* v. *United States*, *supra*; *Standard Oil Co.* v. *United States*, *supra*; *United States* v. *Reading Co.*, 253 U. S. 26; *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366. See also Breckenridge, "Legal Study on Constitutional Power of Congress to Regulate Stock Ownership in Railroads Engaged in Interstate Commerce," House Report No. 2789, 71st Cong., 3d Sess., Vol. 1, p. 1.

[10] Federal Trade Commission Report to the Senate, "Utility Corporations," S. Doc. 92, Part 72–A, 70th Cong., 1st Sess., p. 858. See also Bonbright and Means, The Holding Company (1932), p. 147; Barnes, The Economics of Public Utility Regulation (1942), pp. 71–81, 143–48.

form consisted of interposing one or more subholding companies between the holding company and the operating companies and issuing, at each level of the structure, different classes of stock with unequal voting rights. Most of the financing of the various companies in the structure occurred through the sale to the public of bonds and preferred stock having low fixed returns and generally carrying no voice in the managements. Under such circumstances, a relatively small but strategic investment in common stock (with voting privileges) in the higher levels of a pyramided structure often resulted in absolute control of underlying operating companies with assets of hundreds of millions of dollars.[11] A tremendous "leverage" in relation to that stock was thus produced; the earnings of the top holding company were greatly magnified by comparatively small changes in the earnings of the operating companies. The common stock of the top holding company might quickly rise in value and just as quickly fall, making

[11] "By the pyramiding of holdings through numerous intermediate holding companies and by the issue, at each level of the structure, of different classes of stock with unequal voting rights, it has frequently been possible for relatively small but powerful groups with a disproportionately small investment of their own to control and to manage solely in their own interest tremendous capital investments of other people's money." Report of the National Power Policy Committee on Public-Utility Holding Companies, H. Doc. 137, 74th Cong., 1st Sess., pp. 4–5.

"The effect of such pyramiding is to multiply greatly the control that can be exercised by the dominant parties through their personal resources. For example, in the illustration just given, an investment of $1 in common stock of Corporation Securities Co. of Chicago would exercise control over about $2,000 invested in properties of some of the operating companies at the bottom of the pyramid. It seems very unsafe to have any form of pyramiding which has such a financial basis, not only on account of the excessive concentration of control over immense masses of property but also because of the opportunity it offers to financial adventurers to have too much influence over the general economic interests of the country." Federal Trade Commission Report, *supra*, note 10, p. 161.

it a natural object for speculation and gambling. In many instances this created financially irresponsible managements and unsound capital structures.[12] Public investors in such stock found themselves the innocent victims, while those who supplied most of the capital through the purchase of bonds and preferred stock likewise suffered in addition to being largely disfranchised. Prudent management of the operating companies became a minor consideration, with pressure being placed on them to sustain the excessive capitalization to the detriment of their service to consumers. Reduction of rates was firmly resisted. The conclusion was accordingly reached by those making the studies that the highly pyramided system "is dangerous and has no justification for existence" [13] and "represents the holding-company system at its worst." [14]

Such was the general nature of the problem to which Congress addressed itself in § 11 (b) (2). Various abuses traceable in substantial measure to the use of the pyramiding device were enumerated in § 1 (b). And it was specifically found in § 1 (b) (3) that the national public interest and the interests of the investors and consumers are or may be adversely affected "when control of such [subsidiary] companies is exerted through disproportionately small investment."

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[12] The Federal Trade Commission Report, *supra*, note 10, p. 860, found that the highly pyramided holding company system tends to make those few in control at the top "(1) neglect good management of operating companies, especially by failing to provide for adequate depreciation; (2) exaggerate profits by unsound, deceptive accounting; (3) seek exorbitant profits from service fees exacted from subsidiaries; (4) disburse unearned dividends, because the apparent gains, so obtained, greatly magnify the rate of earnings for the top holding company; and (5) promote extravagant speculation in the prices of such equity stocks on the exchanges."

[13] *Ibid.*, p. 162.

[14] *Ibid.*, p. 860.

The problem which underlies § 11 (b) (2), therefore, deals with the very essence of holding company systems. Their pyramided structures and the resulting abuses, like their other characteristics, rest squarely upon an extensive use of the mails and the instrumentalities of interstate commerce. Conversely, every interstate transaction of such systems is impregnated in one degree or another with the effects of complicated corporate structures and inequitable distributions of voting power. Many of these effects may be intangible and indistinct, but they are nonetheless real.

To deny that Congress has power to eliminate evils connected with pyramided holding company systems, evils which have been found to be promoted and transmitted by means of interstate commerce, is to deny that Congress can effectively deal with problems concerning the welfare of the national economy. We cannot deny that power. Rather we reaffirm once more the constitutional authority resident in Congress by virtue of the commerce clause to undertake to solve national problems directly and realistically, giving due recognition to the scope of state power. That follows from the fact that the federal commerce power is as broad as the economic needs of the nation. *North American Co.* v. *S. E. C.*, *supra.*

II.

We likewise reject the claim that § 11 (b) (2) constitutes an unconstitutional delegation of legislative power to the Securities and Exchange Commission because of an alleged absence of any ascertainable standards for guidance in carrying out its functions.

Section 11 (b) (2) itself provides that the Commission shall act so as to ensure that the corporate structure or continued existence of any company in a particular holding company system does not "unduly or unnecessarily complicate the structure" or "unfairly or inequitably dis-

tribute voting power among security holders." It is argued that these phrases are undefined by the Act, are legally meaningless in themselves and carry with them no historically defined concepts. As a result, it is said, the Commission is forced to use its unlimited whim to determine compliance or non-compliance with § 11 (b) (2); and in framing its orders, the Commission has unfettered discretion to decide whose property shall be taken or destroyed and to what extent. Objection is also made on the score that no standards have been developed or announced by the Commission which justify its action in this case.

These contentions are without merit. Even standing alone, standards in terms of unduly complicated corporate structures and inequitable distributions of voting power cannot be said to be utterly without meaning, especially to those familiar with corporate realities. But these standards need not be tested in isolation. They derive much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear. See *Intermountain Rate Cases*, 234 U. S. 476. From these sources—from the manifold evils revealed by the legislative investigations, the express recital of evils in § 1 (b) of the Act, the general policy declarations of Congress in § 1 (c), the standards for new security issues set forth in § 7, the conditions for acquisitions of properties and securities prescribed in § 10, and the nature of the inquiries contemplated by § 11 (a)—a veritable code of rules reveals itself for the Commission to follow in giving effect to the standards of § 11 (b) (2). These standards are certainly no less definite in nature than those speaking in other contexts in terms of "public interest," "just and reasonable rates," "unfair methods of competition" or "relevant factors." The approval which this Court has given in the past to those standards thus compels the sanctioning of the ones in issue. See *New*

York Central Securities Corp. v. *United States*, 287 U. S. 12, 24–25; *Yakus* v. *United States*, 321 U. S. 414, 419–27, and cases cited.

The judicial approval accorded these "broad" standards for administrative action is a reflection of the necessities of modern legislation dealing with complex economic and social problems. See *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 398. The legislative process would frequently bog down if Congress were constitutionally required to appraise beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation. Necessity therefore fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules; it then becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. Private rights are protected by access to the courts to test the application of the policy in the light of these legislative declarations. Such is the situation here.

Under these circumstances, it is of no constitutional significance that the Commission, in executing the policies of § 11 (b) (2), also has discretion to fashion remedies of a civil nature necessary for attaining the desired goals. See *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 194. The legislative policies and standards being clear, judicial review of the remedies adopted by the Commission safeguards against statutory or constitutional excesses.

Nor is there any constitutional requirement that the legislative standards be translated by the Commission into formal and detailed rules of thumb prior to their application to a particular case. If that agency wishes to proceed by the more flexible case-by-case method, the Constitution offers no obstacle. All that can be required is

that the Commission's actions conform to the statutory language and policy.

III.

Our decision in *North American Co.* v. *S. E. C.*, *supra*, largely disposes of the objections to § 11 (b) (2) on the basis of the due process clause of the Fifth Amendment.

Section 11 (b) (2), like § 11 (b) (1), materially affects many property interests of holding companies and their investors; it may even destroy whatever right there is to continued corporate existence on the part of a holding company that is found to complicate a system unnecessarily and to serve no useful function. But Congress carefully considered these various interests and found them "outweighed by the political and general economic desirability of breaking up concentrations of financial power in the utility field too big to be effectively regulated in the interest of either the consumer or the investor and too big to permit the functioning of democratic institutions." [15] It is not our function to reweigh these diverse factors or to question the conclusion reached by Congress. Nor can we say that § 11 (b) (2) on its face authorizes or necessarily involves any destruction of any valuable interests without just compensation. The legislative policy and the statutory safeguards pointed out in the *North American* case negative that argument.

Equally groundless is the contention that § 11 (b) (2) is void in the absence of an express provision for notice and opportunity for hearing as to security holders regarding proceedings under that section. The short answer is that such a contention can be raised properly only by a security holder who has suffered injury due to lack of notice or opportunity for hearing. No security holder of that type is now before us. The managements of American and Electric admittedly were notified and participated in the

[15] Senate Report No. 621, 74th Cong., 1st Sess., p. 12.

hearings as required by § 11 (b) (2); and they possess no standing to assert the invalidity of that section from the viewpoint of the security holders' constitutional rights to notice and hearing. See *Tyler* v. *Judges of Court of Registration*, 179 U. S. 405, 410; *Hatch* v. *Reardon*, 204 U. S. 152, 160.

However, the Commission in this instance actually gave all security holders of American and Electric public notice of the pendency of the § 11 (b) (2) proceedings and invited them to file applications for intervention before a stated time. This was done pursuant to § 19, which permits the Commission, in accordance with such rules and regulations as it may prescribe, to admit any representative of interested consumers or investors, or any other appropriate person, as a party to any proceeding before that body. These security holders thus received everything which the Constitution could possibly guarantee them in this respect.

That the statute does not expressly insist upon what in fact has been given the security holders is without constitutional relevance under these circumstances. Wherever possible, statutes must be interpreted in accordance with constitutional principles. Here, in the absence of definite contrary indications, it is fair to assume that Congress desired that § 11 (b) (2) be lawfully executed by giving appropriate notice and opportunity for hearing to all those constitutionally entitled thereto. And when that assumption is added to the provisions of § 19, it becomes quite evident that the Commission is bound under the statute to give notice and opportunity for hearing to consumers, investors and other persons whenever constitutionally necessary. See *The Japanese Immigrant Case*, 189 U. S. 86, 100–01.

But should the Commission neglect to follow the necessary procedure in a particular case, such failure would at most justify an objection to the administrative determina-

tion rather than to the statute itself. It would then be needless to do more than nullify the action taken in disregard of the constitutional rights to notice and opportunity for hearing. Since we do not have that situation here, however, we need only reiterate that § 11 (b) (2), fairly construed, neither expressly nor impliedly authorizes unconstitutional procedure. It is thus immune to attack on that basis. See *Kentucky Railroad Tax Cases*, 115 U. S. 321; *Bratton* v. *Chandler*, 260 U. S. 110; *Toombs* v. *Citizens Bank*, 281 U. S. 643. Cf. *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413; *Wuchter* v. *Pizzutti*, 276 U. S. 13.

IV.

Turning to the Commission's action under § 11 (b) (2) with respect to American and Electric, we find that the record amply supports the finding that their corporate structures and continued existence unduly and unnecessarily complicate the Bond and Share system and unfairly and inequitably distribute voting power among the security holders of that system. We need do no more here than state the major facts before the Commission underlying this crucial finding.

Bond and Share organized these two subholding companies under the laws of Maine in 1909 and 1925, respectively. Until 1935 American and Electric had neither offices nor employees; their books were kept by Bond and Share employees in Bond and Share's offices in New York City. Their officers were employed by and paid by Bond and Share. Their subsidiaries were managed in every detail by Bond and Share. And whenever they dealt with their parent they were represented solely by employees and counsel of Bond and Share. Functionally, the Commission found, American and Electric were mere sets of books in Bond and Share's office.

In 1935, shortly before the effective date of the Public Utility Holding Company Act, certain superficial changes

were made in the organizational set-up of the Bond and Share system. A separate service subsidiary, Ebasco Services Incorporated, was created to continue functions formerly carried out by the Bond and Share service department. Each of the subholding companies, including American and Electric, was given its own set of officers and employees as well as a separate suite of offices in the Bond and Share office building. Other minor changes took place, but the system in effect continued to operate precisely as it had prior to 1935. Bond and Share still had complete and unquestioned control over American, Electric and their operating subsidiaries.

There is an absence of substantial evidence that either American or Electric is presently able to perform any useful role in the operations of its subsidiaries, such as organizing them into integrated systems or furnishing them with capital or cash. Both companies currently have vast accumulations of unpaid preferred dividends in arrears, not having been able to meet dividend requirements in the ten years preceding 1941. Instances of past functions relating to subsidiaries reveal either harmful results or the guiding hand of Bond and Share.

The real purpose of American and Electric, as the Commission found, is to act as the leverage and pyramiding device whereby Bond and Share can amass control over vast sums contributed by others and realize for itself large earnings and profits without proportionate investment—the prime evil at which § 11 (b) (2) is directed.

Bond and Share holds 20.7% of the total voting stock of American, this holding having a book value of nearly $10,000,000 or 3.68% of American's total capitalization of $270,000,000. Through this investment, Bond and Share controls not only American but also American's 21 subsidiaries with a total capitalization of $729,000,000. An investment of $10,000,000 thus controls $729,000,000, a ratio of 1 to 73.

Bond and Share also holds 46.8% of Electric's total voting stock; the book equity of this holding amounts to $17,500,000 or 9.14% of Electric's total capitalization of $192,000,000. Bond and Share is thereby enabled to control not only Electric but also Electric's 11 direct and 11 indirect subsidiaries with a total capitalization of $654,000,000. An investment of $17,500,000 thus controls $654,000,000, a ratio of 1 to 37.

The Commission, however, made alternative calculations which gave American and Electric the benefit of a more favorable assumption. It adjusted upward the book figures for Bond and Share's common stock interests in these companies to reflect the amount by which the values on the books of the subsidiaries exceeded corresponding values at which American and Electric carried their stock interest in those subsidiaries. But even after such adjustments, Bond and Share's investment equals only 8.2% of American's capitalization and only 3.42% of the book values of American's subsidiaries; and its investment in Electric is the equivalent of only 22.25% of Electric's capitalization and 8.72 % of the book values of Electric's subsidiaries.[16]

This disproportion between Bond and Share's investment and the value of the property controlled is even more acute if further adjustments are made to reflect the unconscionable write-ups and inadequate depreciation which the Commission found in the book figures of the various operating companies. American and Electric disagree with many of these adjustments and urge that the book

[16] Bond and Share's holdings of voting stock of all five of its subholding companies have a stated book value of only $53,337,600, after adjustment for preferred arrearages, which is equal to about 1.85% of the combined consolidated capitalization of the five subholding company systems. This results, after adjustments, in rendering completely ineffectual whatever voting power remains for the securities in the hands of the public investors who have contributed over 80% of the total capitalizations.

values can be justified; and complaint is made that the Commission refused to consider certain valuation testimony offered by American in this respect. We deem it unnecessary, however, to enter into these disputed matters. Even with the use of the book values, the attenuated investment ratio is such as to justify the Commission's conclusion that Bond and Share's control of the operating companies is achieved "through disproportionately small investment." On that basis, over 96% of the investment in American's subsidiaries is without effective voting representation, while over 91% of the book values of Electric's subsidiaries is similarly disfranchised.[17]

Such evidence is more than enough to support the finding that American and Electric are but paper companies without legitimate functional purpose. They serve merely as the mechanism by which Bond and Share maintains a pyramided structure containing the seeds of all the attendant evils condemned by the Act. It was reasonable, therefore, for the Commission to conclude that American and Electric are undue and unnecessary complexities in the Bond and Share system and that their existence unfairly and inequitably distributes voting power among the security holders of the system.

V.

The major objection raised by American and Electric relates to the Commission's choice of dissolution as "nec-

[17] We do not understand the Commission to contend that the percentage of voting power and the percentage of investment should necessarily be equal. Its view simply is that no process of weighting could render fair and equitable a distribution of voting power by which Bond and Share controls all of American's subsidiaries by an investment representing at best 3.42% of their capitalization, or 8.72% in the case of Electric's subsidiaries. See In re Electric Bond and Share Company, 9 S. E. C. 978, 992.

essary to ensure" that the evils would be corrected and the standards of § 11 (b) (2) effectuated. Emphasis is placed upon alternative plans which are less drastic in nature and which allegedly would meet the statutory standards.

It is a fundamental principle, however, that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy "the relation of remedy to policy is peculiarly a matter for administrative competence." *Phelps Dodge Corp.* v. *Labor Board, supra,* 194. In dealing with the complex problem of adjusting holding company systems in accordance with the legislative standards, the Commission here has accumulated experience and knowledge which no court can hope to attain. Its judgment is entitled to the greatest weight, while recognizing that the Commission's discretion must square with its responsibility. Only if the remedy chosen is unwarranted in law or is without justification in fact should a court attempt to intervene in the matter. Neither ground of intervention is present in this instance.

Dissolution of a holding company or a subholding company plainly is contemplated by § 11 (b) (2) as a possible remedy. It directs the Commission to take such steps as it finds necessary to ensure that "the corporate structure or continued existence of any company in the holding-company system" does not violate the standards set forth. American and Electric argue that the phrase "in the holding-company system" limits the authority of the Commission to orders removing a particular company from the holding company system of which it is a part and does not permit an order terminating its corporate existence. Grammatically, this contention is without merit. The phrase "in the holding-company system" no more modifies "continued existence" than it does "corporate structure."

It relates, rather, to the word "company,"[18] as though the phrase read "the corporate structure or continued existence of any company which is in the holding-company system."

Such a construction accords with the policy as well as other provisions of the Act. Section 1 (c) declares it to be one of the policies of the Act, in accordance with which all provisions shall be interpreted, "to provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided in this title." The last sentence of § 11 (b) (2) provides that "Except for the purpose of fairly and equitably distributing voting power among security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, . . ." Moreover, §§ 11 (f) and 11 (g) specifically refer to dissolution or plans for dissolution of registered holding companies or their subsidiaries in accordance with § 11.[19] Such statements would be meaningless and unnecessary were dissolution not contemplated as a possible remedy under § 11 (b) (2).

The legislative history supports this interpretation. The original bill which passed the Senate (S. 2796, 74th Cong., 1st Sess.) contained a provision quite similar to the present first sentence of § 11 (b) (2), except that it was mandatory that the Commission require each registered

[18] The words "any company in the holding-company system" were substituted for the words "such company" in an earlier draft of § 11 (b) (2). No change in substance was thereby indicated.

[19] Section 11 (f) refers to fees, expenses and remuneration paid in connection with any reorganization, dissolution, liquidation, bankruptcy or receivership of a registered holding company or a subsidiary thereof. Section 11 (g) speaks of proxies, etc., used "in respect of any plan under this section for the divestment of control, securities, or other assets, or for the dissolution of any registered holding company or any subsidiary company thereof."

holding company and subsidiary "to be reorganized or dissolved" when the Commission found that it violated the standards of that section. In addition, § 11 (e) as then written permitted a voluntary plan "for the divestment of control, securities, or other assets, or for the reorganization or dissolution, of such company or any subsidiary company." The bill also contained a § 11 (b) (3), providing that within five years all holding companies should cease to be holding companies unless the equivalent of a certificate of convenience and necessity were obtained from the Federal Power Commission. But the House of Representatives insisted upon the elimination of § 11 (b) (3) and the bill finally reported out by the joint conference committee deleted that provision. A further change was made at this time so that § 11 (b) (2), instead of specifying reorganization or dissolution as the remedies, gave the Commission power to require "such steps" as it might find necessary to ensure compliance. Section 11 (e) was also changed to permit a voluntary plan "for the divestment of control, securities, or other assets or for other action by such company or any subsidiary company thereof."

Thus the compromise bill which became law omitted the unconditional provision of § 11 (b) (3) for the elimination of all holding companies within five years, substituting therefor the "great-grandfather clause" of § 11 (b) (2), and gave the Commission discretion to determine the necessary steps for compliance instead of specifying reorganization or dissolution. There is nothing to indicate that the framers of the compromise bill meant to forbid reorganization or dissolution as remedies which the Commission might choose. Indeed, the fact that these two remedies had been previously specified is strong evidence that they were in the minds of those who wrote the portion of § 11 (b) (2) now under consideration and that those persons merely wished not to restrict the Commission to those two remedies; they thus gave the Commission discretion to

choose whatever remedy it felt necessary. This legislative history, when combined with the various references to dissolution in other parts of § 11, compels the conclusion that dissolution is one of the remedies contemplated by § 11 (b) (2) and that its choice falls within the allowable area of the Commission's discretion.

Nor can we say that the Commission's choice of dissolution with respect to American and Electric is so lacking in reasonableness as to constitute an abuse of its discretion. The Commission chose dissolution because it felt that such action is calculated to correct the situation "most effectively and quickly, ever bearing in mind the stated policy of the Act to provide *as soon as practicable* for the elimination of all holding companies except as expressly provided in the Act." 11 S. E. C. at 1215. It stated that while some measure of amelioration in the statutory offensiveness of American and Electric might be afforded by other approaches, "in our opinion no approach presently available holds out the promise of effectuating the statute's requirements fully or promptly." *Ibid.*, p. 1215. Cf. *Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608. That this choice of dissolution in preference to other remedies is not lightly to be disregarded is shown by the statement of Dr. Walter Splawn, much relied upon by Congress in shaping this statute, that "The most effective means of preventing pyramiding is to eliminate the so-called intermediary company interposed between the operating company and the company at the top." [20]

Without attempting to invade the domain of the Commission's discretion, we can readily perceive a factual basis underlying the choice of dissolution in this instance. The Commission reasonably could conclude from the record that American and Electric perform no justifiable function; they are unnecessary complexities enabling

[20] Splawn Report, Pt. 2, p. VII, made pursuant to H. J. Res. 572, 72d Cong., 2d Sess., referred to in § 1 (b) of the Act.

Bond and Share to perpetuate its pyramided system. The actual and potential evils resulting from their continued existence may well be said to outweigh any of their claimed advantages, especially since many of the latter seem impossible of attainment due to the unsound financial structures of the companies. The Commission was thus warranted in feeling that dissolution of these companies is necessary to the attainment of the standards of § 11 (b) (2).

We are unimpressed, moreover, by the claim that dissolution is so drastic a remedy as to be unreasonable. Elimination of useless holding companies may be carried out by fair and equitable methods so as to destroy nothing of real value. American and Electric, the Commission found, are little more than a set of books and a portfolio of securities. And we cannot say that the Commission was without basis for its belief that dissolution under these circumstances would harm no one. It may well have considered the fact brought out in the argument before us that, so far as Bond and Share and the public security holders are concerned, dissolution would mean little more than the receipt of securities of the operating companies in lieu of their present shares in American and Electric. Any number of benefits might thereafter accrue to these security holders. Their equities in the Bond and Share system would be materially strengthened by the removal of the useless and costly subholding companies and their voting power would tend to be more in proportion to their investment. The financial weaknesses of the various companies remaining in the system would be easier to correct, with numerous benefits to the consumers and the general public as well as the investors.[21] "In short, the individual investor should

[21] "It is thus apparent that though Section 11 is on occasions still referred to as a 'death sentence,' the sophisticated observer no longer regards even the directed reorganization or liquidation of a holding

receive the kind of a security he thought he was buying in the first place. The actual clearing up, through clean reorganizations, of the tangle in which holding-company finance has left the industry and those who have invested in it, can reestablish a confident, stable market for good utility securities." Senate Report No. 621, 74th Cong., 1st Sess., p. 17. These factors lend substance to the Commission's conclusion that "the dissolution of these companies which not only have never served any useful purpose but have been a medium of much harm, will effectuate the provisions and policies of the Act and will in all respects be beneficial to the public interest and the interest of investors and consumers; and we so find." 11 S. E. C. at 1215.

In view of the rational basis for the Commission's choice, the fact that other solutions might have been selected becomes immaterial. The Commission is the body which has the statutory duty of considering the possible solutions and choosing that which it considers most appropriate to the effectuation of the policies of the Act. Our review is limited solely to testing the propriety of the remedy so chosen from the standpoint of the Constitution and the statute. We would be impinging upon the Commission's rightful discretion were we to consider the various alternatives in the hope of finding one that we consider more appropriate. Since the remedy chosen by the Commission in this instance is legally and factually sustainable, it matters not that American and Electric believe that alternative orders should have been entered. It is likewise irrelevant that they feel that Bond and Share is

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company as a step to be feared by investors. There is increased recognition that these steps in the enforcement of the Act have been 'akin to a surgical operation, through which the dead skin (the top holding company) was being cut away from the pores (the operating companies) in order to allow the latter to breathe.'" Blair-Smith and Helfenstein, "A Death Sentence or a New Lease on Life?" 94 Univ. of Pa. L. Rev. 148, 201.

the principal offender against the statutory standards and that the Commission should merely have required Bond and Share to divest itself of its interests in American and Electric. The Commission found that American and Electric violate the statutory standards, a finding that is supportable whatever may be the shortcomings of Bond and Share.

Finally, lengthy objections have been made relative to the Commission's procedure in treating alternative plans filed under § 11 (e) by American and Electric. These plans were designed to adjust the companies to the standards of § 11 (b) (2) without the necessity of dissolution. Motions were made to consolidate the applications for approval of these plans with the proceedings instituted by the Commission under § 11 (b) (2), the hearings then having been in progress for more than a year and the record approaching completion. The Commission deferred consideration of the motions until it entered the § 11 (b) (2) orders now under review; it then denied the motions and refused to grant hearings on the plans in advance of its orders of dissolution. It did this, however, only after thorough examination of the proposed plans and after finding that they failed to hold out any real promise of effectuating the standards of § 11 (b) (2).

We fail to perceive any error in this procedure. The filing of the § 11 (e) plans, of course, did not oust the Commission of jurisdiction to enter its orders under § 11 (b) (2). That jurisdiction grows out of the statutory command that the Commission declare by order, as soon as practicable, what each holding company system requires by way of integration and simplification. Section 11 (e) merely permits the holding companies to formulate their own programs for compliance with § 11 (b) or to submit plans in conformity with prior Commission orders under § 11 (b), appropriate notice and hearing being contemplated. It does not necessarily give such plans the effect

of staying proceedings under § 11 (b) (2) where such proceedings are initiated prior to the filing of the plans. Any other conclusion would permit the filing of dilatory plans so as to render impotent the power and duty of the Commission to enter § 11 (b) (2) orders as soon as practicable.

We assume that the Commission will give due consideration to any plans that are filed under § 11 (e) before it enters a § 11 (b) (2) order. If it finds that such plans may have merit and may effectuate the policies of § 11 (b) (2), the principles of orderly administration would dictate that entry of the § 11 (b) (2) order be deferred until full hearings are had with respect to the plans.[22] It might then become apparent that an involuntary order under § 11 (b) (2) would be unnecessary and statutory compliance could be worked out solely under § 11 (e). But where consideration leads the Commission to the conclusion that the plans on their face are incomplete, inadequate and unlikely to satisfy the statutory standards, or where the plans are found to have been filed solely for purposes of delay, it would be contrary to the statutory policy of prompt action to require the Commission to hold hearings on the plans before entering a § 11 (b) (2) order. The Commission then would have no reasonable statutory alternative but to enter the § 11 (b) (2) order as soon as practicable, especially where the unsatisfactory plans are filed long after the institution of the § 11 (b) (2) proceedings. And it is proper for the Commission to make an adverse determination of this nature in regard to the

[22] With reference to S. 2796, it was said: "Subsection (e) expressly authorizes a holding company subject to the approval of the Commission and the court to work out a plan of reorganization to make unnecessary the issuance of an involuntary order for its reorganization by the Commission, . . ." Senate Report No. 621, 74th Cong., 1st Sess., p. 33.

§ 11 (e) plans at the time of entry of the § 11 (b) (2) order, such matter lying within the sound discretion of the Commission.

Here the Commission gave due consideration to the § 11 (e) plans and found them to be incomplete and inadequate on their face. It pointed out that seven years had elapsed since the effective date of the Act, four and a half years since the date after which action under § 11 was to be required "as soon as practicable" and more than two years since the present proceedings had been instituted. These factors of time and the lack of substance in the § 11 (e) plans led the Commission to conclude that a delay in the entry of the § 11 (b) (2) orders which it felt necessary to the effectuation of the statutory standards would not be justified. And our examination of the situation reveals an adequate basis in fact for the Commission's action. Note should be made of the fact that the Commission did not refuse by order to hold hearings on the § 11 (e) plans. But to the extent that the entry of the § 11 (b) (2) orders has made the plans moot or the hearings unnecessary, the result is one that is inevitable if proper accommodation is to be made for the different sections of the Act and for the various statutory policies.

Moreover, a § 11 (b) (2) proceeding leads only to the expression of the Commission's view of what must be done to ensure compliance with the statutory standards. Actual compliance comes later. In the meantime, nothing precludes American or Electric from seeking revocation of the dissolution orders on a showing that the conditions upon which the orders were predicated do not exist, thereby making some other type of order more appropriate. Section 11 (b) expressly envisages such a procedure, with provision for notice and hearing. American and Electric thus are not yet foreclosed from attacking the Commission's orders under § 11 (b) (2).

From what we have said it follows that we must affirm the judgment of the court below and sustain the action of the Commission. The other points that have been raised either do not merit discussion or have been adequately answered in the opinion of the court below.

Affirmed.

MR. JUSTICE FRANKFURTER agrees with this opinion except that he believes that consideration of the requirements of notice and hearing under § 11 (e) does not arise, in view of the particular circumstances under which the § 11 (b) (2) orders were here made.

MR. JUSTICE REED, MR. JUSTICE DOUGLAS and MR. JUSTICE JACKSON took no part in the consideration or decision of these cases.

SUPREME COURT OF THE UNITED STATES

Nos. 4 and 5.—October Term, 1946.

American Power & Light Company, Petitioner, v. Securities and Exchange Commission.	On Writs of Certiorari to the United States Circuit Court of Appeals for the First Circuit.
Electric Power & Light Corporation, Petitioner, v. Securities and Exchange Commission.	

[November 25, 1946.]

Mr. Justice Rutledge, concurring.

I concur in the result and in the Court's opinion, except those portions of Part V dealing with the Commission's procedure in treating the alternative plans filed under § 11 (e) of the Act by American and Electric.

Although, for reasons to be stated, I think the Commission's action in entering its § 11 (b) (2) order must be sustained, I do not think its procedure in respect to making provision for dealing with the alternative plans was in compliance with § 11 (e) or the rights to notice and hearing on such plans which it assured. Because the matter may be of considerable importance for the future, I desire to state my reasons for difference from the views expressed by the Court in this respect.

Section 11 (b) (2) makes it the Commission's duty "as soon as practicable after January 1, 1938," to require by order each registered holding company and each subsidiary thereof, after notice and opportunity for hearing, to take such steps as the Commission shall find necessary to ensure "that the corporate structure or continued existence of any company in the holding company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security hold-

ers. of such holding company system." 49 Stat. 803, 821. If this section stood alone and unqualified in the Act, the Commission's power would be unquestionable to require the necessary steps to be taken to accomplish the section's stated purposes without reference to voluntary plans submitted by the companies affected.

But § 11 (b) (2) does not stand alone or unqualified in this respect. Section 11 (e)[1] expressly provides for the submission of plans to effectuate the objects of § 11 (b) (2) by "any registered holding company or any subsidiary company of a registered holding company." This is to be done "in accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers." Moreover, "if, *after notice and opportunity for hearing*, the Commission shall find such plan, *as submitted or as modified*, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan. . . ." (Emphasis added.)

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[1] "*In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers*, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). *If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan;* and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. . . ." 49 Stat. 801, 822. (Emphasis added.)

I do not think that § 11 (e) simply provides a procedure alternative to that of § 11 (b), which the Commission is free to follow or disregard at its pleasure. Both the terms of the Act and the legislative history show that the purpose of § 11 (e) was to allow companies affected "to work out a plan of reorganization to make unnecessary the issuance of an involuntary order for its reorganization . . .," which could only be issued under § 11 (b). S. Rep. No. 621, 74th Cong., 1st Sess., 33; *Commonwealth & Southern Corp.* v. *S. E. C.*, 134 F. 2d 747, 751. In my opinion this purpose, together with the provision for voluntary plans to be submitted "in accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors,"[2] assures the right to submit such plans for the Commission's consideration and to have them considered and determined "after notice and opportunity for hearing." See *Chicago Junction Case*, 264 U. S. 258, 264–265.

Furthermore, although the section gives the Commission broad discretion concerning the procedure to be followed, it would seem clear, both from the section's purpose and from its terms, that the Act contemplates that it shall make the required determination, concerning such a voluntary plan properly submitted, prior to the entry of any order under § 11 (b). Cf. *Ashbacker Radio Corp.* v. *F. C. C.*, 326 U. S. 327. Only in this way could the legislative purpose "to make unnecessary issuance of an involuntary order" be made effective. This being true, the section cast upon the Commission the duty of

[2] The requirement obviously is not a permission to the Commission to dispense altogether with such rules, regulations or order in its discretion. It is rather a statutory direction to make them in accordance with the standards prescribed. Any other view would contradict the stated purpose of the section and make of it, in effect, a dead letter.

providing the appropriate procedure for submitting voluntary plans, by rules, regulations or order comporting with the specified standards, including those for notice and hearing.

The record does not disclose that the Commission at any time complied with those requirements in these cases. So far as appears no general rules or regulations were issued. Nor was any order made or entered providing for such a procedure. On the contrary, the procedure followed was not, in its initial stages, in accordance with the statutory provisions, as the following chronology demonstrates.

On May 10, 1940, notice of hearing under § 11 (b) (2) was served on the petitioners. The notice made no reference to § 11 (e) or any possible alternative proceedings under it. The hearing was set for June 10, 1940, scarcely time for the petitioners to prepare both a voluntary plan, even if opportunity for filing and hearing were to be afforded, and a defense on the § 11 (b) (2) hearing. Indeed, petitioners recognized that the time was inadequate for preparing their defense, for they applied for postponement of the hearing and other relief.[3] The Commission postponed the hearing one week, but found no adequate ground for further extension.

The hearing was commenced on June 18, 1940. On July 23, 1941, American submitted its voluntary plan under

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[3] The application stated in part: "It is obvious from the nature of the proceeding . . . that the matters to be dealt with at the hearing are of vital import to the respondents and their subsidiaries, as well as to the hundreds of thousands of investors in securities of companies in the Electric Bond and Share Company system and the millions of consumers presently receiving necessary public utility service from the operating companies in said system. In the circumstances, respondents believe, first, that they should be given adequate time not only to check and verify the numerous factual allegations contained in the order, but also to develop and correlate for presentation all other facts having a bearing upon the problems and issues presented by the notice and order. . . ."

§ 11 (e). On December 3, 1941, Electric filed its plan. And on December 6, 1941, both companies moved to consolidate their applications with the pending § 11 (b) (2) proceedings.[4] By agreement of counsel consideration of the motion was delayed for the Commission to pass upon at the end of the § 11 (b) (2) hearing[5] and on July 22, 1942, that hearing was closed as to petitioners by stipulation.

On August 31, 1942, the Commission filed its opinion in support of the orders which are now enforced. In the same opinion it denied the motion to consolidate and also denied petitioners any hearing on their voluntary plans.

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[4] At the same time American, which previously had filed its plan with the Commission, sought to introduce the plan as an exhibit into the § 11 (b) (2) hearing. The company's attorney stated, "This plan which has been filed by American Power & Light with the Commission sets forth a proposal for the compliance with Section 11 of the Act, and I think that it is material and relevant in this proceeding." The reply of the trial examiner, sustaining an objection to its admission, apparently typifies the attitude of the Commission toward the requirements of § 11 (e): "Quite possibly it relates to Section 11; quite possibly it is a matter which the Commission will want to consider before it finally makes up its mind. It is quite probable. But, nevertheless, we are here restricted to this particular proceeding and not the power of the Commission or the action of the Commission. The hearing is restricted to 11 (b) (2)."

The Commission at no time before or during the hearing recognized that § 11 (e) plans not only were relevant to whether action should be taken under § 11 (b) (2), but also were required to be considered by hearing before such action is taken. Its view apparently is to the contrary. See Matter of *Electric Bond and Share Company*, 11 S. E. C. 1146, 1217–1218, quoted in note 7 *infra*; Matter of *The Commonwealth & Southern Corporation*, 11 S. E. C. 138, 154–156. The examiner, of course, could not help himself. The hearing had been limited to § 11 (b) (2). 7 S. E. C. 391.

[5] The record does not disclose what the agreement was or for what reasons it was made. To delay consideration of the motion to consolidate was in effect to deny it insofar as it sought a joint hearing, though it was always possible for the Commission to order a hearing on the voluntary plans before it issued its § 11 (b) (2) order.

The motion was denied on the stated ground: "It appears that if consolidation were granted, the result would be to inject into the present proceeding issues of fact and law in many respects different from, and unrelated to, those here involved. In consequence, no useful purpose would be served by permitting the consolidation of the 11 (e) Plans with the present proceeding, but on the contrary, delay and confusion would inevitably result." [6] Consistently, separate hearing was denied as to the voluntary plans apparently on the grounds that consideration of them would delay the § 11 (b) proceeding, so as to defeat the statutory policy of prompt action,[7] and that the plans were incomplete and ineffective.

It is apparent from this recital that the Commission did not at any time comply with the requirement of § 11 (e) that it provide by rules, regulations or order an orderly procedure to carry out the section's command and purpose

[6] 11 S. E. C. 1146, 1152. The Commission noted that "these plans were filed at a time when the record in the present proceeding was nearing completion." *Ibid.*

[7] "With respect to the former point, that of promptness, it need only be considered that it would be necessary for respondents and the Public Utilities Division to formulate and present, and for us to explore, detailed and very extensive evidence on a number of extremely complex subjects *before it would be possible for us to determine even the preliminary question of whether the 11 (e) plans do in fact constitute acceptable alternative courses of action* for achieving the objections of Section 11. In the event it were necessary to determine the question in the negative, presumably we should be free (even under respondents' contention) to enter our order of dissolution herein following the lengthy delay, unless respondents in the meantime proposed a new 11 (e) plan which would necessitate a repetition of this process. On the other hand, in the event we were ultimately able to approve the plans, they would still not become effective unless and until ratified by vote of the companies' stockholders.

"Considering that 7 years have now gone by since the effective date of the Act, that 4½ years have elapsed since the date after which action under Section 11 was to be reqdired 'as soon as practicable', and that more than 2 years have been consumed since the present pro-

for the submission and consideration of voluntary plans. And if petitioners had stood upon their rights in this respect, by timely action taken in good faith, the Commission's failure to observe them would have given ground for reversal.

But it is equally obvious that the petitioners did not assert their rights in a manner which invalidates the Commission's action in entering its § 11 (b) (2) order or made the denial of the motion for hearing reversible error. The petitioners had notice that the Commission would proceed with the § 11 (b) (2) hearing from the time such notice was given in May, 1940. They applied for a continuance. But the record does not disclose that they sought it in order to have time to prepare and submit a voluntary plan or indeed that they took any action toward securing a hearing on such a plan until they submitted their plans. In one case this was more than a year after the § 11 (b) hearing began, in the other nearly a year and a half after that time. When shortly after the latter submission the motions to consolidate were made, consideration was deferred by agreement of counsel until the end of the § 11 (b) (2) hearing; and about seven months later that hearing was closed as to the petitioners by stipulation.

Although in my opinion it was the Commission's duty initially to make provision for notice and hearing on voluntary plans, in accordance with § 11 (e), the petitioners hardly can be considered to have been ignorant either of

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ceeding was instituted, it is evident that respondents' program is too fraught with potentialities of delay to be acceptable as a substitute for a dissolution order to meet the problems existing under Section 11 (b) (2). Section 11 (2) which provides a medium for voluntary compliance with Section 11 (b) was not intended to oust the Commission of its jurisdiction, or relieve it of its obligation, to enforce the provisions of 11 (b)." 11 S. E. C. 1146, 1217–1218. Compare notes 4 and 6, *supra*.

this duty or of the Commission's failure to perform it. By standing by through the long period of the § 11 (b) proceedings prior to the time of submitting their plans without taking earlier action to secure preservation of their rights to hearing on such plans, the petitioners should be taken to have waived their rights to such hearings. They were not entitled to assert them for the first time at so late a stage in the § 11 (b) proceedings. Nor, in my opinion, is the Commission required to give further consideration to such plans in these cases, unless in its own discretion it sees fit to do so.[8]

[8] Cf. § 11 (b): "The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist." 49 Stat. 803, 821.